PROCEEDINGS

OF THE

# American Society of International Law

AT ITS

TWENTY-EIGHTH ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

APRIL 26–28, 1934

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*Saturday, April 28, 1934, 10 o'clock a. m.*



ANNUAL BANQUET

*Saturday, April 28, 1934, 8 o'clock p. m.*

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FOR THE YEAR 1934–1935

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# CONSTITUTION

OF THE

# AMERICAN SOCIETY OF INTERNATIONAL LAW[1]

(Revision of April 25, 1925.)

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## ARTICLE I

*Name*

This Society shall be known as the American Society of International Law.

## ARTICLE II

*Object*

The object of this Society is to foster the study of international law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

## ARTICLE III

*Membership*

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the *American Journal of International Law* issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause for which this Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation

[1] The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting at p. 23. The Constitution was adopted January 12, 1906.

of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

## Article IV

### *Officers*

The officers of the Society shall consist of a President, an Honorary President, three Vice-Presidents, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council, a Secretary,[1] and a Treasurer, all of whom shall be elected annually, and of an Executive Council composed of the foregoing officers, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen. No elected member of the Executive Council shall be eligible for reëlection until the next annual meeting after that at which his term of office expires.

The Secretary[1] and the Treasurer shall be elected by the Executive Council. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee, which shall consist of the five members of the Society receiving the highest number of ballots cast by the members at the first session of the Annual Meeting of the Society. The Executive Council may submit a list of nominees.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

## Article V

### *Duties of Officers*

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council, or by vote of the Society.

2. The Secretary[1] shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him.

[1] As amended April 26, 1930.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programs therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairman, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

## Article VI

### *Meetings*

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

## Article VII

### *Resolutions*

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members,

be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

## Article VIII

*Amendments*

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments to the Constitution may be proposed by the Council, or by a communication in writing signed by at least five members of the Society and deposited with the Secretary[1] within ten months after the previous annual meeting, and any amendments so deposited shall be reported upon by the Council at the succeeding annual meeting. All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon and no amendment shall be voted upon until the Council shall have made a report thereon to the Society.

[1] As amended April 26, 1930.

## REGULATIONS OF THE EXECUTIVE COUNCIL REGARDING THE EDITING AND PUBLICATION OF THE AMERICAN JOURNAL OF INTERNATIONAL LAW

*Adopted May 22, 1924*

1. There shall be a Board of Editors charged with the general supervision of editing the *American Journal of International Law* and determining general matters of policy in relation thereto.

2. The Board shall be elected annually by the Executive Council.[1]

3. Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles prepared by non-members of the Board. The minimum number of contributions which each Editor shall be called upon to contribute or obtain for publication in the *Journal* is to be determined by the Board.[2]

4. There may be an Honorary Editor-in-Chief elected by the Council; and there shall be an Editor-in-Chief and a Managing Editor to be elected annually from among the members of the Board by the Executive Council, and to serve until their successors assume office.

The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*.

The Managing Editor shall have charge of the publication of the *Journal*, shall receive contributions and other material for publication, including books for review, and conduct the correspondence regarding the same.

In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by the Managing Editor, unless the Editor-in-Chief shall designate an acting Editor-in-Chief.

5. The *Journal* shall be made up of leading articles, editorial comments, a chronicle of international events, a list of public documents relating to international law, judicial decisions involving questions of international law, book reviews and notes, a list of periodical literature relating to international law, and a supplement.

(a) Before publication all articles shall receive the approval of two members of the Board. In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief. Articles by members of the Board of Editors shall be submitted to the Editor-in-Chief, who shall decide as to their publication.

(b) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of Paragraph 6 hereof. Current notes of international events, containing no com-

[1] As amended April 24, 1926 and April 25, 1929. [2] As amended April 25, 1929.

ment, may be printed over the signatures of non-members of the Board of Editors in the discretion of the Managing Editor.

(c) In the department of judicial decisions, preference in publication shall be given to the texts of decisions of international courts and arbitral awards which are not printed in a regular series of publications available for public distribution. This department may also contain the texts of decisions of the Supreme Court of the United States and the highest courts of other nations involving important questions of international law. Comments upon court decisions, either those printed in the *Journal*, or those not of sufficient importance to print textually, may be supplied by members of the Board of Editors, and shall be printed as editorial comments or current notes.

(d) The chronicle of international events, and the lists of public documents relating to international law and periodical literature of international law, shall be prepared under the direction of the Managing Editor.

(e) The supplement shall be made up of the texts of important treaties and other official documents. Material for it shall be supplied by the Managing Editor, taking into consideration such suggestions from the members of the Board as they may have to offer from time to time.

6. The final make-up of each number of the *Journal* shall be submitted by the Managing Editor to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. In the absence of such a veto, the Managing Editor shall be authorized to publish the *Journal*, using approved material so far as approval is prescribed herein.

7. The *Journal* shall be published upon the 15th days of January, April, July and October, or as near to those dates as possible, and the Managing Editor shall have power to proceed with the publication of the *Journal* from the materials in his hand upon the first day of the month preceding the month of publication.

8. The Managing Editor shall receive such compensation for his services, and such allowance for clerical assistance, as may be fixed by the Executive Council.

# TWENTY-EIGHTH ANNUAL MEETING

OF THE

# AMERICAN SOCIETY OF INTERNATIONAL LAW

THE WILLARD HOTEL, WASHINGTON, D. C.

APRIL 26–28, 1934

## FIRST SESSION

### Thursday, April 26, 1934, 8 o'clock p. m.

President JAMES BROWN SCOTT. Ladies and gentlemen: The twenty-eighth annual meeting of the American Society of International Law is opened.

From time to time, we have discussed the treaty-making power in all its various aspects, some being in favor of an unlimited exercise of the power and others desiring to see it subjected to certain conditions or limitations. This will be the subject of the paper which I have the honor to present tonight. Before doing so, I should like to call your attention to the program, because the program committee for this year, it seems to me, has been very industrious and very well advised. Leaving aside the address on the treaty-making power of the United States, we shall have this evening from a most accredited speaker a discussion of the significance of the Seventh International Conference of American States, a very timely question, hardly less timely than it was three or four months ago. Tomorrow we shall hear discussed the international regulation of tariffs, a question which has always been timely, but which is more timely now by virtue of the purpose of the Government to enter into tariff treaties in the near future.

On the afternoon of tomorrow we will have discussed the question of the legal status of aliens under Soviet treaties, and the effect of applied communism on the principles of international law, two new subjects for the Society, which have never been discussed before; they are new to the world.

Then tomorrow evening we shall hear a discussion of the Securities Law of 1933 and of the reorganization and rehabilitation of governmental loans looking to the protection of foreign bondholders, incomplete in its character as some feel that it should also include the protection of domestic bondholders as well.

On Saturday morning we shall have the business meeting, and on Saturday evening the usual banquet at which there will be very acceptable and distinguished speakers: Mr. William Phillips, Under Secretary of State; the Ambassador of Russia to the United States—we have waited a long time for the recognition of the Soviet Government, but it is a long lane that has no turning; and then a circuit judge of the United States, a judge of the sex which,

some years ago, would have been excluded from this respectable Society; and then Mr. Coudert, who is not unknown to this Society.

I hope you will all appreciate the program, because this year it is very worth while, very short, leaving much time for discussion.

The subject which I shall attempt to discuss tonight is the treaty-making power of the United States. It is not a matter which I would have chosen myself, because I have expressed views heretofore on the subject; it is a controversial matter, and I am not particularly given to controversies. But it happened some time ago that three members of the Society were seated at one and the same table at the Harvard Club in this city, and the question came up of the St. Lawrence Waterways Treaty, and one of our distinguished members who will be here tonight intimated that there was a certain phase of it that was unconstitutional. Another gentleman present did not express himself in such general terms, but, by implication, suggested the existence of limitations upon the treaty-making power. The speaker of this evening expressed himself in favor of an unlimited grant of the treaty-making power, to be exercised under the authority of the United States, and this is the question which will occupy us this evening.

## TREATY-MAKING UNDER THE AUTHORITY OF THE UNITED STATES

By James Brown Scott
*President of the Society*

Some time ago, at a luncheon of the Harvard Club, three members of the American Society of International Law were sitting together at a table. It happened that at that time the Great Lakes-St. Lawrence Deep Waterway Treaty was before the Senate. One of the trio expressed the opinion that the treaty should not be approved by the Senate because it would be unconstitutional in part,—meaning, of course, that one of its terms was contrary to the provisions of the Constitution of the United States. The second member did not dissent from the opinion of the first but laid stress on what we might call the implicit—as distinct from express—limitations in the treaty-making power of the United States. And the third—who addresses you this evening—ventured to remark that, after much hesitation and after more than one change of view, he had come to the conclusion that the framers of the Constitution looked upon the treaty-making power as international rather than domestic, in that it was and should be above and beyond the power of the individual States to make or break a treaty, and that while the method of making treaties is domestic, their content is international. Therefore the exercise of the power was vested in the President and two-thirds of the senators present. There are, however, no words of limitation in the grant of the treaty-making power. It is only the process of treaty-making which is stated and defined in the Constitution, whereas the power itself is to be exer-

cised not, as one might expect, under the Constitution as are acts of Congress, but "under the authority of the United States."

The thirteen original colonies, later to form the thirteen original States, looked upon themselves as separate and distinct appanages of the British Crown, with charters from the Crown granting territory and jurisdiction to the grantees and their colonial successors. These colonies constituted, in fact if not in name, an American Commonwealth, just as today the self-governing dominions of the British Crown are the "world encircling" British Commonwealth of Nations, whose relationship to the British Isles is that of the American Colonies before their declaration of independence, and whose relationship with one another is through a common sovereign and superintending head.

That the treaty-making power was known to and exercised by the colonies long before their independence—and indeed before they ever thought of an independent existence—is evident from an examination of colonial records. They only need to be opened to see the exercise in all its parts of the treaty-making power—among themselves, with England, with a foreign country such as France, and above and beyond all, with the Indians, then independent and buffer states, as it were, between the colonists and their rivals in the partition and settlement of the vast American continent. Of the many treaties, a few only can be chosen as types.

The first of the six to be mentioned is none other than the articles of the New England Confederation, "ratified," in the language of Governor Hutchinson (the greatest of colonial historians), "by Massachusetts, Connecticut and New Haven, May 19, 1643." After this sentence follows another precious statement for our purpose: "Plymouth commissioners had not then full powers, but they acceded at the first meeting for business September 7th following."[1]

Before such an audience as this, we do not need to discuss the aim and purpose of the confederation,—the first step toward a union of the colonies and toward that most perfect union which we call the United States of America. Let us, however, compare the action of the New Englanders of the confederation with that of the statesmen of the League of Nations. The dominant purpose of the League of Nations was peace. The means were threefold: the guarantee of territorial integrity and political independence of the members; peaceful settlement of international disputes; economic and military sanctions. The dominant purpose of the New England Confederation was likewise peace. The means were threefold: the safeguarding of territorial integrity and political independence of the members; peaceful settlement of disputes likely to lead to a rupture between the members and their neighbors; economic and military sanctions. The similarity of the New England Confederation to the League of Nations, has it not been overlooked in our devotion to local matters? We are, however, justified in considering

[1] Thomas Hutchinson, The History of Massachusetts, from the First Settlement Thereof in 1628, until the Year 1750 (3rd ed., Salem, 1795, Vol. I, p. 119).

the confederation as a diplomatic triumph and the unexpected prototype of the most international of international agreements.

The confederation was of the north. Let us now turn from New England to Virginia, affectionately termed the "Old Dominion." Now New England was, to put it mildly, anti-dynastic; but Virginia was royalist to the core. Has not Edmund Spenser more than intimated its loyalty to the Crown in what we republicans of the west would call an overgracious dedication of his *Faerie Queene* to the unfairylike Elizabeth, crediting her with the kingdoms —perhaps we might be allowed to say "queendoms"—of England, of Ireland, of France (although in truth France was then neither English nor British), the list of kingdoms ending with Virginia. There were, then, four kingdoms. When King James of Scotland succeeded to the crown of England, there were five, but in the reign of the first George of the Hanoverian line the number of kingdoms upon the seal was reduced by the union with Scotland to four; and the number so continued until the repudiation of His Most Gracious Majesty George III, when the kingdoms which had figured upon the seal of Virginia were replaced by three simple but heart-stirring words: *"Sic semper tyrannis."* Given the loyalty of the kingdom of Virginia, the good people of that realm, as might be expected, were not pleased with the trend of events on the other side of the water which culminated in the execution of Charles I and the exile of his children. There was a repercussion, as was also to be expected, in Virginia, and during the civil war in the Dominion which followed the execution of Charles, two loyalists, Sir William Berkeley, then Governor of Virginia, and Colonel Richard Lee, Secretary of State of Virginia and the American ancestor of the great Lees, "kept the Colony to its allegiance, so that after the death of Charles I"—to quote William Lee, a descendant of Colonel Lee—"Cromwell was obliged to send some ships-of-war and soldiers to reduce the Colony," which resulted in "a treaty . . . with the Commonwealth of England, wherein Virginia was styled an independent dominion. This treaty"—to continue the quotation—"was ratified here [in Virginia] as made with a foreign power."[2]

We now return to New England, where Massachusetts undertook the dangerous task of judging between two French claimants to the government and possession of Nova Scotia, then a dominion of France. Unfortunately, Massachusetts "picked the wrong horse"—to use an expression of My Lord Salisbury, which must be diplomatic, because when he made it he was Her Majesty's Principal Secretary of State for Foreign Affairs. Of course the good people of Massachusetts found a way out—a characteristic, we may say,

[2] The quotation above is to be found in Old Churches, Ministers and Families of Virginia, by Bishop Meade (Philadelphia, 1897), and was taken from the manuscript of no less a person than William Lee, from which it appears that the contracting parties, doubtless considering themselves equals for the purpose of this diplomatic document, were Cromwell's England and an American dominion. Vol. II, p. 137. The treaty itself is to be found in the Journals of the House of Burgesses of Virginia, 1619–1658/9, and published in Richmond in 1915, pp. 79–81.

of diplomacy. The unsuccessful claimant was dropped and an "embassy"—such is the word used—appeared in Boston from Nova Scotia to treat with Governor Winthrop and the magistrates of Massachusetts, where, of course, the members of the "embassy" were cordially received. The main point for us, however, is the terms of the treaty, the negotiations for which were carried on in Latin,[3] then the formal diplomatic language of Europe. A "firm peace," free trade and arbitration were agreed upon; and, although the treaty was to have immediate effect, nevertheless "the full ratification and conclusion of this agreement" was to be referred—to quote the language of the treaty—"to the next meeting of the commissioners of the united colonies of New England, for the continuation or abrogation of the same; and in the meantime to remain firm and inviolate." The contracting parties had, however, made up their minds in advance, and the negotiations were concluded—quite contrary to European precedent—within the space of three days. For our Massachusetts ancestors were a frugal lot, and they even complained about the expenses incurred in a diplomatic transaction of but three days.

It is to be observed that this was a treaty by a member of the New England Confederation analogous to a treaty concluded by a member of the League of Nations with another country. It needed to be, and actually was, ratified by the confederation. To us of today, who no longer require the study of the classics in our higher seats of learning, it is interesting to note that not only the original treaty, but also the ratification, was in Latin. If this were suddenly made the diplomatic language of today, even our most distinguished diplomats of the enlightened century in which we live would, it is opined, lean heavily upon their secretaries for their Latin, who would also be slender and trembling, if not broken, reeds. In the use of the international language of the time, the transaction in question was diplomatic in the highest sense of the term.

The next instance—the fourth of the series—is of immense importance. The contracting parties were Indian Nations, and duly authorized representatives of various of the American Colonies. They met at Lancaster, Pennsylvania, and we have as complete a record of the negotiations as of any European treaty concluded in modern times. For the details of the gathering, we refer the incredulous to Witham Marshe's *Journal of the Treaty Held with the Six Nations by the Commissioners of Maryland, and other Provinces Held at Lancaster, in Pennsylvania, June, 1744.* Marshe was secretary of the Maryland "embassy"—the word is his.[4]

One of the results of this gathering provides us with an interesting parallel. In the United States, the President and two-thirds of the senators present and

[3] The Huchinson Papers (Albany, 1865, The Prince Society Edition), Vol. I, pp. 164–5; John Winthrop, The History of New England, from 1630 to 1649, Vol. II, p. 197 (Boston, 1825).

[4] Collections of the Massachusetts Historical Society for the Year MDCCC (Boston, 1801), Vol. 7, pp. 171–201.

concurring make a treaty which becomes the law of the land after exchange of ratifications and promulgation by the President. But if moneys are required, the House of Representatives comes into action. This was also the custom in the colonies. A famous instance is of August 13, 1737, when a message from the Pennsylvania House of Representatives startled and annoyed the President and Council of that colony, just as a refusal on the part of the House of Representatives of the United States to vote moneys to carry into affect a treaty would annoy the President and members of the Senate. The colonial message is not only a notable document but it is as a warning even to our President and Senate, in the exercise of their treaty-making power, to consult in advance our House of Representatives, in order that the moneys may be forthcoming when they are needed, both for the negotiation and the execution of a treaty of the United States with any and every foreign Power. What was the message? A remonstrance of the Pennsylvania Assembly, in that "several sums of public money" had been appropriated "for defraying the charges of Indian Treaties, which"—the Assembly reminds the President and Council—"we humbly conceive you have no right to do."[5] It is unnecessary to add that their remonstrance was effective.

The last of the examples is like the first—only more so—of the instances cited. The first was the confederation of the New England Colonies which lasted some forty years, the contracting parties being four in number. In the case of the last example the delegates who assembled at what is called the Albany Congress of 1754[6] were more numerous, representing no less than seven of the colonies, and they attempted to do for the seven colonies what Massachusetts had done for four. However, the confederation of the four New England Colonies was regional, whereas the Albany Congress might be called "continental." The interests of the New England Colonies were similar, if not identical; the interests of the American Colonies—extending from the north to the south—were diverse and conflicting until the tyranny of the English Crown brought them together in Philadelphia in the memorable Declaration of Independence. Our Benjamin Franklin, of large experience in matters of business as well as in the art, and indeed craft, of diplomacy, was the outstanding figure of the congress which aimed at an organic union of the American Colonies. An elaborate "plan," providing for a Governor General and Assemblies, and defining the functions of each, was presented and discussed. However, it was a compromise of uncompromisable conditions, between Great Britain on the one hand and the colonies on the other. The reason? Franklin states it in his *Autobiography*, saying that "the assemblies did not adopt it [his plan], as they all thought there was too much *prerogative* in it, and in England it was judg'd to have too much of the *democratic*." We learn by our failures—at least the elect of us, like Franklin.

[5] Minutes of the Provincial Council of Pennsylvania (Harrisburg, 1851), Vol. IV, p. 238.

[6] Journal of the Proceedings of the Congress held in Albany, in 1754—Collections of the Massachusetts Historical Society (Boston, 1836), Vol. V of the Third Series, p. 6.

In the Albany Congress, American diplomacy of colonial days reached its culmination. It was not a gathering for the settlement of trifling boundary disputes or for trade agreements. It was a conference of the American Colonies on the eve of a war which was to decide that North America above the Rio Grande should be an English-speaking world. The Six Indian Nations—themselves a confederation, under the name of the "League of the Iroquois"—cast their lot with the colonies and, through them, with Great Britain. The assembly was a true congress, in the eighteenth century meaning of the word. It was made up of delegates from provinces which regarded themselves as independent of one another, to deliberate on war and peace, not merely with one another but with a foreign Power (France), in behalf of their own interests and the interests of Great Britain, and also to negotiate an offensive and defensive alliance with the Indians—then regarded as separate nations—essential to the existence of the colonies. Not merely was the future of every American colony at stake, and not merely the interests of Great Britain and France in America involved, but the supremacy of one or the other in the Old World: with the fall of Quebec, the scepter passed into English hands just as at Yorktown it was to pass from English to American hands.

Thus every form of diplomacy had made its appearance at the Congress, and for us of the Western World the Congress of Albany is as important as was that of Westphalia for Europe.

Therefore it appears that the colonies had made treaties with one another before their independence,—treaties made in accordance with the law of nations. Not only were they under international law but they are in form and effect examples of the treaty-making power as then exercised in the Old World and to be exercised on a continental scale in the New World.

Treaty-making, international congresses, full powered delegates, bilateral and multilateral concords and agreements, therefore, were all part of the traditional American mode of thinking when on July 4, 1776, the thirteen American Colonies assembled in Philadelphia and addressed their momentous declaration "to a candid world."

The motion for a declaration of independence was made by Richard Henry Lee of Virginia, on June 7, 1776. There were in reality three motions: the first, for independence; the second, "that it is expedient forthwith to take the most effectual measures for forming foreign alliances." In other words, the treaty-making power was to be invoked by the independent states immediately by means of alliances with foreign governments, in order to secure the independence which they had proclaimed. And the third motion provided that "a plan of confederation be prepared and transmitted to the respective colonies for their consideration and approbation."

The treaty-making power is mentioned by implication in the opening paragraph and expressly in the concluding paragraph of our charter of independence. The states were "to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God

entitle them"; and the closing paragraph states that "these United Colonies are, and of right ought to be free and independent States; . . . that as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

It needs no extraordinary degree of acumen to conclude that the United States, as separate and equal states, would have the full right of free and independent states, and that, having this right, it would be their duty to agree to pass laws for the protection within their own jurisdiction of foreigners and their interests and to secure the rights of the United States and of their citizens in foreign nations through treaties negotiated with each and every one of them. The treaty-making power must therefore be a full power, because it was largely through its exercise that the United States could "do all other acts and things which independent States may of right do." This full power was to be exercised under the Articles of Confederation by the States "in Congress assembled," and under the Constitution of the United States it is and doubtless will continue to be exercised as a full power "under the authority of the United States."

What were the fundamental principles controlling the exercise of this power within the United States? We do not need to speculate. We have them in black and white in the Articles of Confederation and in the Constitution of the United States. To the provisions of each in the matter in hand I invite your attention.

The express purpose of the Revolutionary statesmen was, as we shall see, to secure by apt and unmistakable words renunciation by the States of participation in any form in the making of treaties; and, when they or their citizens were affected by the treaties—the treaties being superior to the laws of the States, since emanating from the nation—the State judges were to be bound thereby, "any thing in the Constitution or laws of any State to the contrary notwithstanding."

Now, as has been demonstrated beyond peradventure, the colonies, before their declaration of independence, were familiar with treaties, some of their statesmen having taken part in their making. After the declaration of their independence, although each State considered itself as independent of the other and as having the rights and duties of a nation under international law, they nevertheless made treaties by joint action in Congress assembled. Of these we would particularly mention the Treaty of Amity and Commerce and the Treaty of Alliance with France, of the 6th of February, 1778, forming, we might say, two parts of one and the same epoch-making agreement.

The Articles of Confederation did not become binding upon the States until March 1, 1781, by the signature of Maryland, the last of the thirteen States affixing its signature. The matter is important, because on February 6, 1778, when the treaties were signed by M. Gérard, in behalf of His Most Christian Majesty, and by Benjamin Franklin, Silas Deane and Arthur Lee,

in behalf of the United States—enumerating the States in their order from north to south, beginning, therefore, with New Hampshire and ending with Georgia—the States were only united in opposition to Great Britain, not by the Articles of Confederation. Indeed Virginia considered itself such a direct contracting party with France in the treaties of Amity and Commerce and of Alliance, that they were approved by the Virginia House of Delegates and by the Governor of that State, and on behalf of the same Governor (who happened to be none other than Thomas Jefferson, whose hand had drawn the Declaration of Independence) the instrument of ratification of the treaties by the Commonwealth of Virginia was delivered to M. Gérard by the Virginia delegation in the Continental Congress; and the ratifications, thus exchanged, were deposited in the Foreign Office of France, where they remain at the present day.

The States individually claimed their respective territories under their charters, and the United States *qua* "United States" did not have any territory of their own. Each foot of soil was the soil of the erstwhile colony claiming it now as a State. To insure harmony and the success of the Revolution, the States settled, or agreed to settle, their conflicting territorial claims with one another; and the great, imperial and dominating State of Virginia in 1784 ceded its territory to the north and west of the Ohio River, extending to the Mississippi (held by the two-fold title of charter and conquest) to the United States, this being the first territory which the United States held in their own name.

The treaties of 1778 with France could only affect the territory of the States, since the United States then possessed no territory of their own, and the treaties in question could therefore only affect the citizens of each of the thirteen contracting States. Therefore, every provision of the French treaties, ratified before the Articles of Confederation became the law of the land, affected directly the States and their citizens. However, under the Articles of Confederation the treaty-making power passed from the individual States to the United States in Congress assembled. And the treaty-making power under the Constitution passed from the United States of the Confederation to the United States of the Constitution. Indeed, in 1786, the year before the Constitution was framed, the Congress of the Confederation had, by a unanimous vote, declared that the treaty-making power was a national power, and a circular letter to this effect, approved by the Congress, was sent by the President of the Congress to the Governor of each of the thirteen States. And just as the treaties made under the Articles of Confederation by, as it is said, "the United States in Congress assembled"—meaning the thirteen States assembled in Congress in the persons of their representatives—bound every State and its respective inhabitants, so all treaties made after March 4, 1789, "under the authority of the United States" bound every State and every citizen of a State or of the United States. The same may be said of treaties previously made, for these treaties under the Confederation had likewise been made under the

authority of the United States as vested in the representatives of the States "in Congress assembled."

In a word, the test of the treaty, both under the Articles of Confederation and under the more perfect union of the Constitution, is that it be made under the authority of the United States, the authority in the one case being vested in the United States in Congress assembled and in the other case vested in the President and Senate of the United States.

This phase of the matter is so material as to warrant elaboration. By the ninth of the Articles of Confederation, "the United States in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances." This provision of the ninth article withdraws from the States the exercise of the treaty-making power, vesting in "the United States in Congress assembled . . . the sole and exclusive right and power" to make treaties. However, there is a further clause that must be quoted, as it is a limitation upon the exercise of what would otherwise be a sole and exclusive right and power of "the United States in Congress assembled" in the matter of making treaties. The limitation follows immediately: "provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." In the third paragraph of the sixth of the articles this right of the States under the ninth article was qualified by the provision that "no State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain."

Let us be generous toward the States and omit from consideration this qualifying third paragraph of the sixth article; in which case, there would be a limitation (as set forth in the ninth article) upon the exercise of the treaty-making power by "the United States in Congress assembled" under the Articles of the Confederation.

But even this limitation or exception to the treaty-making power the States renounced by the first article (eighth section, third clause) of the Constitution, providing that Congress shall have the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," thus withdrawing from the States the one time reservation to the States under the Articles of Confederation. Therefore the treaty-making power of the Constitution was the treaty-making power exercised before the Constitution, but being subject to no exceptions, it was and is a sole and exclusive power.

Let us now turn to the treaty-making power under the more perfect Union.

There are some three passages of the Constitution which deal with treaties, their making and their effect. This matter was the subject of careful, and indeed anxious, consideration in the Federal Convention and in the State

conventions elected by the people of each of the States to pass upon the Constitution.

The first defines the method of making the treaty; the second and third, the force and effect of the treaty when made. The first is of an equal importance with, and to a certain extent greater importance than, the second because, if a treaty be not made in accordance with the Constitutional provision, it is no treaty and therefore neither the foreign state nor the Government of the United States is bound by the transaction.

> Art. II, Sec. 2, par. 2:
>
> He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; . . .
>
> Art. III, Sec. 2, par. 1:
>
> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . .
>
> Art. VI, par. 2:
>
> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

From the wording of the first clause, it is clear that the President is to negotiate the treaty or to authorize the appropriate authority to do so, under his direction. But the treaty, when drafted and even when signed, is but a project; it is not a treaty. The intervention of the Senate is necessary, the Constitution providing that this intervention shall consist of "the advice and consent" of "two-thirds of the Senators present." Now the meaning of this was clear to the framers of the Constitution. It seems to be less clear to us of today, especially to Presidents and to their Secretaries of State.

The members of the Federal Convention were greatly troubled by the treaty-making power, its disposition, its force and effect. Therefore, they prescribed the method of its making and likewise, as they thought, the supremacy of a treaty to the laws of any State, but with, at the same time, a permanent check upon the abuse of the treaty-making power.

There is an entry in Madison's *Debates of the Federal Convention* on June 8th, when the delegates were in Committee of the Whole, which goes far to show the reasons why the treaty-making power which the States had exercised before the adoption of the Federal Constitution, was withdrawn from the States and vested in the United States. When the article of the Virginia plan, vesting the national legislature with a negative on the laws of the States, "contrary to the articles of Union, or treaties with foreign nations" was presented, Charles Pinckney of South Carolina moved "that the National Legislature shd. have authority to negative all laws which they shd. judge to be

improper," insisting "that the States must be kept in due subordination to the nation; . . . that the acts of Congress had been defeated by this means; nor had foreign treaties escaped repeated violations; that this universal negative was in fact the corner stone of an efficient national Govt.; that under the British Govt. the negative of the Crown had been found beneficial, and the *States* are more one nation now, than the *Colonies* were then."

Mr. Pinckney's motion was seconded by no less a person than James Madison, saying, that "experience had evinced a constant tendency in the States . . . to violate national treaties," and that "a negative was the mildest expedient that could be devised for preventing these mischiefs."

Mr. Madison's account of the debates is here somewhat elaborate: "The other clauses giving powers necessary to preserve harmony among the States to negative all State laws contravening in the opinion of the Natl. Leg. the articles of Union, down to the last clause (the words 'or any treaties subsisting under the authority of the Union,' being added after the words 'contravening &c. the articles of the Union'; on motion of Dr. Franklin) were agreed to witht. debate or dissent."

On Tuesday, July 17th, in the convention, Mr. Luther Martin moved "that the legislative acts of the U. S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U. S. shall be the supreme law of the respective States, so far as those acts or treaties shall relate to the said States, or their citizens and inhabitants—& that the judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding which was agreed to nem: con:." It will be observed that this resolution was agreed to *nem. con.* It is also to be observed that we have the legislative acts of the United States made by virtue and in pursuance of the Articles of Confederation, separated from "all treaties made and ratified under the authority of the United States": as was the case with every draft of the Constitution theretofore considered.

In the convention there was the inevitable struggle between the large States and the small States. Randolph's plan was a large State plan. On Friday, the 15th of June, Mr. Patterson, then Governor of New Jersey (he was elected seventeen times in succession and was destined shortly to be a justice of the Supreme Court under the Constitution), laid before the convention the New Jersey, or "small State" plan. The article of his plan most material to the purpose in hand resolved "that all acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those acts or treaties shall relate to the said States or their citizens, and that the judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding." This seems familiar doctrine, and not unfamiliar language, to

those who are familiar with this section of the Constitution of the United States.

But the plan went farther,—farther than we of today would go, and the further provision is important as showing the complete separation of the States from all participation in, or interference with, the treaty-making power: "And that if any State," the resolution continued, "or any body of them in any State shall oppose or prevent ye carrying into execution such acts or treaties" —meaning, of course, *made and ratified under the authority of the United States*—"the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such acts, or an observance of such Treaties."

It will be noted that in every part of this article of this project drafted by Mr. Patterson, in order to prevent the small States from being swallowed up by the larger States, a distinction is drawn between the acts of the States and treaties.

What was the effect of the constitutional separation of the treaty-making from the strictly legislative power? In the mind of at least one of the Revolutionary fathers, the effect was to create a fourth branch of the government. Indeed, Alexander Hamilton stated in the *Federalist*, on March 26, 1788, that "the power in question [of making treaties] seems, therefore, to form a distinct department, and to belong, properly, neither to the legislative nor to the executive."

At about the same time Charles Cotesworth Pinckney expressed, in the South Carolina debates on the Federal Constitution, a view similar in concept if not in wording to that of Hamilton. On January 17, 1788, he thus expounded the opinion that the treaty-making power was in fact, if not expressly, vested in what we may call the diplomatic branch of the government: [7]

> Now let us consider whether the power of making treaties is not as securely placed as it was before. It was formerly vested in Congress, who were a body constituted by the legislatures of the different states in equal proportions. At present, it is vested in a President, who is chosen by the people of America, and in a Senate, whose members are chosen by the state legislatures, each legislature choosing two members. Surely there is a greater security in vesting this power as the present Constitution has vested it, than in any other body. Would the gentleman vest it in the President alone? If he would, his assertion that the power we have granted was as dangerous as the power vested by Parliament in the proclamations of Henry VIII., might have been, perhaps, warranted. Would he vest it in the House of Representatives? Can secrecy be expected in sixty-five members? The idea is absurd. Besides, their sessions will probably last only two or three months in the year; therefore, on that account, they would be a very unfit body for

[7] The Debates in the Several State Conventions on the Adoption of the Federal Constitution as recommended by the General Convention at Philadelphia in 1787, collected and revised from contemporary publications by Jonathan Elliott (Philadelphia, 1891), Vol. IV, pp. 230–231.

> negotiations whereas the Senate, from the smallness of its numbers, from the equality of power which each state has in it, from the length of time for which its members are elected, from the long sessions they may have without any great inconveniency to themselves or constituents, joined with the President, who is the federal head of the United States, form together a body in whom can be best and most safely vested the diplomatic power of the Union.

It is to be presumed that the members of the Federal Convention were not unaware of what they were doing. And as a check they provided that a treaty, to be made "under the authority of the United States," should be concurred in by "two thirds of the Senators present." This did not mean that two-thirds of the Senate should be present; it did not mean, therefore, that two-thirds of the senators should take part in the concurrence. It did mean that two-thirds of the senators actually present should have to vote for a treaty; otherwise it would be rejected.

The part of the Senate in acting as a check upon the treaty-making functions of the President seems to us so natural as to require no discussion of its *raison d'être*. Nevertheless, there was a special reason for the insertion in the Constitution of the check to be exercised by two-thirds of the senators present. And this reason was that a certain group of the States, those in the south, having interests that extended to the Mississippi, were vitally concerned in that river and its navigation. They feared that if the treaty-making power were exercised without a check, it might be used to the prejudice of their interests in the Father of Waters through the cession either of rights of navigation or of other rights by treaty. Therefore they desired a rein upon the exercise of the treaty-making power, and the stronger the rein the better, they felt, for the interests of all, and particularly their own interests. The concurrence of a mere majority of the senators present would not, they considered, sufficiently restrain the treaty-making power from possible misuse. To quiet their apprehensions on this point it was provided that the concurrence of two-thirds, instead of a simple majority, of the senators present should be required for the ratification of treaties.

In the next place, the framers of the Constitution further secured, as they thought, their control of the treaty-making power by prefixing to the words "two-thirds of the Senators present," two little words, "advice" and "consent." In the minds of the framers there must have been a difference between the two, because the Constitution of the United States is a concise document, containing the appropriate word in its appropriate place and connection. Apparently, in the view of the framers, the President should not, of his own initiative, conclude a treaty. They contemplated that he should receive the "advice and consent" of the Senate. So that, if he should conclude a treaty in accordance with the advice of the Senate, then the members of the Senate would, because of their advice, have bound themselves, in fact if not in law, to consent, whereas, if the treaty presented to the Senate should deviate from the text of

the treaty which two-thirds of the senators present had advised, then their consent, under these circumstances, to such a modified treaty would in effect be a consent to a new treaty to which they had not been an advising party.

In the early days of our treaty-making power, it was the custom of the President, or of the Secretary of State, to consult the Senate. This practice, unfortunately, appears to have been followed for only a few years, after which the President, with rare exceptions, acted on his own advice and submitted to the consent of the Senate the treaty which he had concluded. Our Secretaries of State appeared to be willing to discuss matters with senators in the Department, but unwilling to present themselves in person before the Senate Committee on Foreign Relations in order to obtain their advice before beginning a negotiation likely to terminate in a treaty. The result was—indeed, still is—a certain friction between the Department of State and the Senate, which, deprived of its right officially to advise in advance, either through the Senate as a whole or through its Committee on Foreign Relations, feels justified in considering both the propriety of the negotiations and the provisions of the treaty concluded on the initiative of the President and his Secretary of State, before giving its consent to such treaty, the terms of which might be unknown alike to the members of the committee and to the members of the Senate before its transmission to the upper house. It is one thing to advise in advance; it is another thing to attempt to exact consent without advice, on the ground that failure to approve the treaty might prejudice our friendly relations with the foreign country involved.

It was the first president of our American Society of International Law who returned to the ways of the fathers. Of course I mean Secretary of State Root, who reintroduced the practice of obtaining the advice of the Senate in advance, complying with the request of the Senate committee—a request procured, it would seem, in advance—to appear before it to explain the aim and the purpose and the effect of the treaty for which he desired the consent of the Senate to the exchange of ratifications.

Perhaps the most striking example of seeking the advice of the Senate before undertaking negotiations with a foreign country is that of Mr. Bryan, who believed in the possibility of negotiating a series of treaties for the advancement of peace. He was so obsessed—in the good sense of the word—with the idea, that he secured from Mr. Wilson, as President-elect, the approval of his series of treaties before accepting the Secretaryship of State, which the then Governor of New Jersey had decided to offer him. The offer was made, the condition was accepted and some thirty treaties were negotiated by Secretary Bryan during his short tenure of that great office.

Mr. Bryan both believed and proved it to be possible to persuade the Powers—not only small Powers, which are always in favor of peace, but the larger Powers, which have grown large generally through war—to agree to refrain from war, or any warlike act, during the year or more in which the commission of inquiry, to which they were parties, would investigate and report a

solution of the controversy, which the contracting disputants could accept or not, according to their sovereign will or pleasure. He negotiated some thirty of such treaties, of which twenty-two were ratified and nineteen are still in effect. This, however, was not all. Mr. Bryan's treaties have been a model for subsequent additional conciliation conventions, also nineteen in number, with the result that thirty-eight agreements of the Bryan type are at the present time in force throughout the world.

How did it happen that Secretary Bryan obtained the consent of the Senate to such a revolutionary and epoch-making series of treaties? By having a draft of the treaty prepared in advance and not only approved by the President but advised by the Senate Committee on Foreign Relations before any negotiation was undertaken. The consequence? With the advice of the Senate committee in advance to conclude the treaties, the consent of the Senate followed as a matter of course when they were concluded and transmitted to the Senate for its approval. Time and circumstances have demonstrated the vast importance of these treaties. For it is possible, indeed probable, that Secretary Bryan's treaty for the advancement of peace with one of the great allied Powers prevented a resort to hostilities with that country during the trying days of our neutrality in the World War.

Why not return to the ways of the fathers? Why should not the President, or his Secretary of State, in accordance with the terms of the Constitution, coöperate with the Senate? Why have the good faith of the United States needlessly questioned, as the result of a refusal of the Senate to give its consent to a specific treaty, when that partner in the treaty-making power might have given its consent if it had been consulted in advance upon the terms of the proposed convention?

So much for the making of a treaty. What is the nature and the scope of a treaty when made "under the authority of the United States"?

The second section of the third article of the Constitution deals, we have seen, with the judicial power, which extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." This very important clause does not deal with the nature, scope and effect of treaties other than that as laws they are to be passed upon, in appropriate cases, by the judicial power of the United States. We here find in the second section of Article III of the Constitution—as we shall also find in the sixth article—a separation of treaties from laws of the United States which are made under the Constitution.

Coming now to the second paragraph of Article VI, with whose text we are familiar, but which we quote again before proceeding to its analysis:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

We have in this short paragraph three clauses. The first deals with the Constitution and "Laws of the United States which shall be made in Pursuance thereof"; the second clause, with "all Treaties made, or which shall be made, under the Authority of the United States"—which, in appropriate cases, are to be the supreme law of the land ("law of the land" having been substituted by Gouverneur Morris for "the law of the States," in an earlier draft considered by the Convention of 1789); and the third clause subjects the judges of the States to the two categories of law,—one made under the Constitution and the other under the "authority of the United States," because the authority of the States as a whole is superior to the constitution or the laws of any and every State.

It has been frequently intimated that the words "the Constitution and the Laws of the United States which shall be made in Pursuance thereof" form a clause by themselves, to be followed by the clause dealing with treaties, of which the exact wording can not be too often quoted, "made, or which shall be made, under the Authority of the United States." It was both natural and proper that the two clauses, although contained in the same article, should be distinct, as one deals with constitutional law and the other with international law and international relations. For a treaty, is it not an international statute, and treaties, are they not international legislation?

The Constitution is a collection of limited powers of which the States had divested themselves in behalf of the general good. The States also granted the treaty-making power. And that the treaty-making power was solely and exclusively vested in the United States is clear from the fact that the States expressly renounced its exercise in the tenth section, first paragraph, of the first article: "No State shall enter into any Treaty, Alliance, or Confederation." It was, moreover, a full and complete grant; at least there is no word of limitation, a fact which would appear to indicate that the States meant fully and completely to divest themselves of treaty-making, which was to be exercised by the United States, in behalf of the United States, of the States and of their peoples.

There is another way of looking at the matter which is perhaps more persuasive. Each of the thirteen original States had a constitution; each of the States—if the decision of the Supreme Court of the United States in Ware *v.* Hylton [8] is to be accepted—upon the declaration of its independence was a free and independent nation under international law. In speaking of the Declaration of Independence, Mr. Justice Chase said, in what has come to be regarded as the leading opinion in the case:

> I consider this as a declaration, not that the united colonies jointly, in a collective capacity, were independent states, &c., but that each of

[8] 3 Dall. 199.

them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power on earth.[9]

What was the consequence? "That all laws made by the legislatures of the several states, after the declaration of independence were the laws of sovereign and independent governments." [10] Ergo—legislative power, including the treaty-making power, being wholly possessed by each of the States, could as their exclusive possession be delegated in such measure as to them seemed fitting. This power, again including the treaty-making power, was delegated, under the Articles of Confederation, to "the United States in Congress assembled." Therefore, under the Confederation, the treaty-making power was exercised by "the United States in Congress assembled." But there was a further delegation—that is to say, a transfer of the delegated power—when the Constitution of 1789 went into effect, for by its terms the treaty-making power was to be exercised "under the authority of the United States" and by the President, "by and with the Advice and Consent of the Senate, . . . provided two thirds of the Senators present concur."

However, may we not be permitted to say that the treaty-making power, delegated though it be, is still exercised by the States, if not directly, then indirectly through their duly constituted agents? The answer to this question involves a consideration of the two-fold nature of the American system of government.

Let us begin at the beginning. Every State of the American Union has two constitutions: the one, a State Constitution, is for local purposes, that is to say, to regulate transactions arising within and terminating within its territory or jurisdiction; the other, the Federal Constitution, belonging equally to each and every State, is for general purposes. The first is the Constitution of the State in its individual capacity; the second is the Constitution of the States in their united capacity—to use Madison's happy phrase. But why two constitutions? Because transactions, while beginning within a State, often pass into other States, or indeed into the world at large; or *vice versa*.

Now the people are the source of the power contained in the first constitution, that of each particular State; in the second, the same people are equally the source of power. There can be no doubt about it. The Constitution for general purposes indicates the source of power in the first seven words of the document, "We the people of the United States," meaning the people of each of the States which were originally mentioned one by one in the early drafts of the Constitution adopted by the Federal Convention of 1787. And if these seven words be not convincing, the implications of the seventh article of the Constitution must be: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." The ratification in question was to be, not by representatives of the States as such, but by representatives of the people of the

[9] 3 Dall. 199, 224. [10] *Ibid.*

ratifying States as the source of power. To be sure, the proposal was made that the Constitution should be ratified by the State legislatures instead of by special conventions specially called and elected by each of the States for the special purpose; but in the end the theory that all power was derived directly from the people prevailed.

Therefore the result is that each State of the union has two constitutions: one for local and one for general purposes, and the two put together provide for the exercise of every power inherent in the people. For example, my State of Maryland has a constitution, with the ordinary branches of government, for what we call local purposes, for matters, that is, beginning and ending within the jurisdiction of the State. Under this constitution it exercises all the powers of a sovereign State, except those which are delegated to the Federal Government in the Constitution of the United States.

Again, the people of Maryland have a government for general purposes, consisting of the Congress of the States in their united capacity—that is to say, the Congress of the United States—composed of two branches. The people of Maryland elect their representatives to the lower house of Congress (at present some six in number) and the same people elect their two delegates to the upper house or Senate to represent them as a State; and they vote for the President of the United States, who is their representative and indeed their agent in conducting negotiations with foreign countries, subject to the advice and consent of the members of the Senate, two of whom are elected by the people of each and every one of the forty-eight States of the American Union. If the representatives of Maryland to the lower House of the national legislature act contrary to the desires of the people of Maryland, they will not be reëlected. If their two senators, in performance of their duty—including their advice and consent, in the matter of the treaty-making power—act contrary to the desires of the people of Maryland, they will not be returned to represent their State. Other agents will be chosen in each case.

What is the result? The President of the United States is the agent for the people of all of the States in the treaty-making power, and the two senators from each of the forty-eight States are the agents of each State in advising and consenting to the treaties which the President as the agent of the States and of the people as a whole may have negotiated, either directly or through his Secretary of State. Therefore it would appear that the people of each State take part in the treaty-making power, through their representatives or agents, just as truly as the people of each State take part in the enactment of laws of each State through their chosen elected representatives. Without the advice and consent of the Senate, the President of the United States can not legally exercise the treaty-making power. Since the people are the source of power or government, whether exercised by the States or by the United States, it is both natural and appropriate that the treaty-making power in its entirety should be vested in the President—the choice of all the States in their united capacity—and in the Senate, also elected by all the States, but in their indi-

vidual capacity and upon a basis of exact equality of membership, the small States having the same influence in the treaty-making power as the largest and most populous American States. The President is thus the general agent of the people of the United States; the senators are the agents of the people within each of the individual States. The Senate, then, as already observed, constitutes the check of the States upon the exercise of the treaty-making power by the general agent of all the people of the United States.

If, however, none of these arguments be convincing, there is still another. If there be such things as reserved rights—and there assuredly are in Congressional legislation under the Constitution—those rights reserved from the treaty-making power of the President and the Senate belong to the people of the States. But, as they have renounced the direct making of treaties, it may be suggested that the senators, who represent the States in the treaty-making power, in advising and consenting to the treaty which the President, as the representative of all the States in the treaty-making power, has negotiated and submitted to the Senate, consent to the exercise of the reserved rights of the States which they represent.

But however this may be, we have two classic statements which justify the policy of the United States in exercising through the treaty-making power what many people consider the reserved powers of the States.

The first is the interpretation of Edward Livingston, Secretary of State in President Jackson's administration, whom Sir Henry Maine has called "the first legal genius of modern times." In a communication of June 13, 1831, addressed by Secretary Livingston to Baron de Sacken, then Russian Chargé d'Affaires, who had asked that Congress pass an act by virtue whereof a Russian subject should succeed to property situated in the State of Tennessee, the Secretary of State said: [11]

DEPARTMENT OF STATE,
Washington, *13th June, 1831.*

BARON DE SACKEN,
Chargé d'Affaires
of Russia.

*Sir,*

I have the honor to give to you as you request in writing the substance of the explanations made in the conference I lately had with you.

First on the subject of the succession of Mr. Barthe in the State of Tennessee mentioned in your note of the 28th February, and my answer of the 26th May last. The circumstances of that case, and the right of the several States to pass Laws for the disposition of the estates to which aliens may become entitled, were fully explained in those notes. But, you further remarked, Sir, that by the Laws of Russia American Citizens in common with all other foreigners might succeed ab-intestate to their relations dying in Russia—and that the Laws of the different States of the American Union by excluding Russian Subjects are wanting in that reciprocity which you seem to think justice requires between the two Nations, and by your written memorandum you desire to know by what means such a reciprocity may be the most easily established.

[11] Department of State, Notes to Foreign Legations, Vol. 4.

By the Federal Constitution, the several States retained all the attributes of Sovereignty which were not granted to the general Government. The right of regulating successions in relation to the subject in question is not among those conceded rights, consequently it was reserved to, and is still vested in the several States—But by the same Constitution it is provided that Treaties made under the authority of the General Government shall be the Supreme Law of the Land, any thing in the Constitution or Laws of a State to the contrary notwithstanding.

This very brief exposition shews at once the cause of the want of comity in the Laws of the United States to which you advert and indicates the remedy, which a treaty between the two Nations would effectually apply.

I have the honor to be, Sir,

With the highest consideration,
Your Obedt. Servt.

(Signed) EDW LIVINGSTON.

It is not to be overlooked that Secretary Livingston's statement was made after the first ten amendments to the Constitution were passed.

The Russian Government took the action suggested, and the treaty was concluded on December 18, 1832,[12] and it remained in effect until January 1, 1913.

It is interesting to note in passing that the three Americans concerned in negotiating this treaty were advocates of State rights: Andrew Jackson, President, a Democrat; Edward Livingston, Secretary of State, a Democrat; James Buchanan, Minister to Russia, a Democrat. The extension of the treaty-making power to State rights is not a Republican doctrine negativing State rights.

The second of the classic statements is of a justice of the Supreme Court of the United States, speaking in behalf of that learned body, which statement justifies the right of the United States to exercise what many people consider the "reserved powers" of the States. Now there is a class of high and far-flying birds known as "migratory birds." They are accustomed to leave the sunny south to disport themselves in Canada, passing through States of the American Union in their northern flight. Within the jurisdiction of the United States they were the victims of sportsmen, and the British Government complained, in behalf of Canada, that the birds were not allowed to proceed through the United States to and from their destination without molestation. The British Ambassador proposed that the Congress should enact a statute forbidding the shooting of this particular kind of game in closed seasons, thus preventing the danger of their extinction. The statute was passed by the Congress of the United States and approved by the President on March 4, 1913.[13] Its constitutionality was contested and it was later declared to be unconstitutional in two decisions of the District Courts of the United States.[14]

[12] Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers—1776–1909, compiled by William M. Malloy (Washington, 1910), Vol. II, pp. 1514, 1517–18.

[13] 37 Stat. 828, 847.

[14] United States *v.* Shauver, 214 Fed. 154; United States *v.* McCullagh, 221 Fed. 288.

So matters stood after the decisions of the Federal Courts; but Secretary Livingston's recommendation was tried and not found wanting. What was not possible under the Constitution to do by act of Congress was declared to be valid "under the authority of the United States."

A treaty was negotiated on August 16, 1916, by Secretary of State Lansing and the Right Honorable Sir Cecil Spring Rice, then British Ambassador to the United States, in behalf of his country. The treaty was ratified by both contracting parties and was proclaimed on December 8, 1916.[15] Subsequently a statute known as the Migratory Bird Treaty Act of July 3, 1918,[16] was passed by Congress to protect migratory birds, in accordance with the terms of the treaty. The constitutionality of the act under the treaty was then questioned, and in the case of Missouri *v.* Holland,[17] the constitutionality of the act was maintained, in 1920, in an opinion by Mr. Justice Holmes, speaking in behalf of the court, in literary as well as judicial language, as was his wont.

Therefore, such an act of Congress which would be unconstitutional without a treaty—because the right involved is one reserved to the States—becomes constitutional if passed in pursuance of a treaty with a foreign country made "under the authority of the United States." Hence it would seem that a treaty under the authority of the United States is superior to an act of Congress pursuant to the terms of the Constitution.

An act of Congress in pursuance of the Constitution is a national or municipal act, as is the Constitution itself; and therefore an act of Congress contrary to the Constitution is unconstitutional. A treaty, however, being an international statute, must be made by the international department of the government and, when made "under the authority of the United States" is an international statute for the contracting or adhering countries. The separation between the two powers is clear and unmistakable; and that the powers are separate and distinct is evidenced by the language which separates them and their exercise from one another.

Let us take another instance which rises or falls with the migratory birds. The difference in the latter case is that the flight was southward rather than northward as in the case decided by Mr. Justice Holmes.

In the Seventh Conference of the American States at Montevideo, the duly authorized representatives of the Republics of Uruguay, Paraguay, Ecuador and Cuba, being possessed of full powers, put their hands and seals to Miss Stevens' Equal Rights Treaty, confessing their belief "that it is possible," in the language of the preamble, "to raise the status of women throughout the world by means of an international agreement." This being so, the distinguished representatives whose names are attached to this epoch-making document—indeed the first of its kind—agreed, in the language of the first article, "that upon the ratification of this treaty men and women shall have equal rights throughout the territory subject to their respective jurisdictions." This

[15] 39 Stat. 1702. [16] 40 Stat. 755. [17] 252 U. S. 416.

is the enacting article. The second provides that the treaty shall go into effect when "it is ratified by at least two states"; and in the third article that it shall be "open as long as may be necessary for adherence by all the states of the world."

A treaty of this nature with two contracting parties would be the first of its kind in the wide, wide world. A quadruple treaty is a triumph, the importance of which can not possibly be over-stated. For it is an event in treaty-making; it is the first great step to the goal toward which, sooner or later, all civilized nations must press; and it can no longer be said that such a treaty can not be concluded because it has never been done before and because its provisions are either not in conformity with, or are further advanced than, the existing laws of the high contracting powers.

In the early days of the French Revolution, Goethe accompanied the army which invaded France and was checked at Valmy. It was only a defeat, and victories might follow the defeat. And after the victory of the Revolutionists at Valmy, he wrote in his diary that that day marked a new era in the world's history. What is true of Valmy is even more true of Montevideo, although only the forward-looking may see it. We should, I am sure, be both proud and happy that Miss Stevens is a life member of the American Society of International Law.

Let us relate the treaty of Montevideo more closely to the matter in hand. Civil and political rights have long been considered as reserved rights of the States of the American Union and therefore, without an amendment to the Constitution, as being beyond the powers of Congress—and indeed of international legislation—to modify. This view, however, has received, I am happy to say, a death blow at Montevideo; for if but a few nations may by treaty agree to a modification of their municipal law, then all nations can do so, thus demonstrating beyond peradventure that the treaty-making power is beyond all others the means whereby inequalities existing under municipal law may be equalized by a uniform international statute superior to each and every conflicting statute in the legislation of the contracting powers.

For us of the United States, Secretary of State Livingston's doctrine is the foundation upon which international equality must rest; and that it can rest upon this foundation was decided by Mr. Justice Holmes in the case of the migratory birds. The difference is that in the Montevideo case the flight was southward to Uruguay rather than northward to Canada. If by treaty between two countries birds may be accorded equal treatment, without regard to plumage or sex, would it not be strange indeed if the nations at large should refuse to adhere to a treaty according to human beings equal treatment regardless of sex?

Let us refer again to the two great precedents which we have cited, and which we invoke here in behalf of the equal rights agreement. In the Russian treaty, which we have already discussed, we have an example of the treaty-making power, which is able to do what the Congress could not do, and

make that the law which was beyond the constitutional grant of Congress to enact. A treaty, however, "under the authority of the United States," would be a law by that same Constitution, binding the United States from the exchange of ratifications, with the advice and consent of the Senate, after its promulgation by the President of the United States.

So much for the concrete application to the question of equal rights of Secretary Livingston's doctrine in the matter of reserved powers.

Taking now the second example, the case of the migratory birds, to which we have referred, what is it but a confirmation of Secretary Livingston's opinion as to the unlimited scope of the treaty-making power? Was not Congress unable, under the constitutional grant and before the signing of the treaty with Great Britain, to pass a valid act upon the subject in question; but was not Congress able, after the signing of the treaty, to pass a law dealing with precisely the same subject, which law was declared valid by the highest judicial authority in the land?

The practice of the Department of State today is that of Secretary of State Livingston; the opinion of the Supreme Court is that of Secretary Livingston. From which it follows that the President, with the concurrence of two-thirds of the senators present, can make a treaty under the authority of the United States binding the United States in their united, as well as in their individual, capacity. And this notwithstanding Secretary Livingston's statement that the power involved was not granted under the Constitution, although legally exercised under the authority of the United States. For while the treaty-making power is limited in the manner of making treaties, it is unlimited as to their content. In a word, the treaty-making power is the source from which international legislation flows, and the subject-matter of international legislation is, as its very name implies, as broad in scope as the international community.

Let us consider the application of this doctrine in two concrete instances. The Constitution vests Congress with the "Power . . . to establish an uniform Rule of Naturalization, . . ." This is a power granted to the Congress; yet treaties of nationality, dealing with the subject of naturalization, have from time to time been made by the government, the meaning of which is that the treaty-making power can apparently exercise a power granted to the Congress. The treaty-making power may also, if the decision in the case of the migratory birds is to be accepted as law, accomplish by treaty what the Congress could not enact,—that is to say, what the Congress can not do under the Constitution, the treaty-making power can accomplish under the authority of the United States. Or, put in other words, the powers not expressly granted by the States to Congress under the Constitution—and said to be reserved because they are reserved to the States—are in fact not reserved in so far as the treaty-making power is concerned. In effect—if not expressly, yet by necessary implication—these powers are granted, not to Congress, but to the United States, to be exercised "under their authority," through the treaty-

making power. In a word, the States themselves retained the right to exercise, through their representatives in the Senate of the United States, upon the request of the President of the United States, the powers not granted to the Congress.

There are two situations in which the individual States take direct part in making the fundamental law of the United States. In neither of these is unanimity required. Thus, the unanimous approval by the States of an amendment to the Constitution is not required, but merely the approval of three-fourths. So much for the first of the two situations in which the individual States play a direct part. The second arises when the States, through their representatives in the Senate, exercise their part in the treaty-making power. Now the advice and consent of the Senate to a treaty does not require the approval of every senator of every State, but of "two-thirds of the Senators" of the United States present.

Let us now discuss a treaty which is soon to be laid before the Senate for its advice and consent. For the delegation of the United States, under instructions received during the Conference at Montevideo, declared its intention to sign, and actually has signed, the Convention on the Nationality of Women, by virtue whereof the contracting states agree that "there will be no distinction based on sex as regards nationality, in their legislation or in their practice." The duty to take Congressional action under this treaty is an international obligation, notwithstanding the statement of the delegation that the agreement "on the part of the United States is, of course and of necessity, subject to Congressional action."

Involved in this matter are two questions of the utmost importance. The first is the Nineteenth Amendment to the Constitution of the United States, by which the right of suffrage, upon terms of equality with men, was conferred upon all women citizens of the United States, except in the District of Columbia, where equality is preserved by denying both men and women the right of suffrage. The conferring of the right of suffrage was looked upon as a State right, to be granted or not granted by the States. In a word, the power to grant State suffrage was therefore regarded as a right reserved to the States, which Congress could not possibly exercise. Being so regarded, the power to grant suffrage could be vested in the Government of the United States only by a renunciation of that power on the part of the States—that is to say, by an amendment to the Constitution, which, by the approval of three-fourths of the States, became the law of the four-fourths.

Many States had already granted the equal right of suffrage to women, and in the slow course of time the women might have obtained the equal right of suffrage with men in all States, even without the aid of the Nineteenth Amendment. But the State passing a law to this effect could withdraw the law at its pleasure, and the tenure of the right was therefore uncertain. The amendment withdrew the reserved power in question from the exercise of the States.

There is at present a further amendment, known as the Lucretia Mott Amendment, before the Congress, to accord to women citizens of the United States equal civil rights with the male citizens of the States. The amendment in full is but two short sentences:

> Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.
>
> Congress shall have power to enforce this article by appropriate legislation.

The attainment of such equality is ordinarily a long and time-consuming process. Now the women might, in the course of time, secure civil and political rights with men, State by State; but, difficult as is an amendment to the Constitution to this effect, the approval of three-fourths of the States is easier to procure than four-fourths. An amendment to the Constitution is in effect a shortening of the process, making the subject-matter of the amendment the law of each of the States in their individual capacity.

There is, however, another and less arduous way of introducing equality in these as well as in other matters. Here we are brought face to face with the migratory birds. An act of Congress for their preservation against the laws of the States was, as we have seen, declared unconstitutional; a treaty to the same effect was made under the authority of the United States and, as a law of the land, it invested Congress with the power and the duty "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The treaty-making power is by our Constitution to be exercised under the authority of the United States, and the branches of the government whose concurrence is necessary are the President and two-thirds of the senators present. It is therefore the duty of Congress to enact such laws as shall be necessary and proper to carry into effect the provisions of a treaty made according to the Constitution, "under the authority of the United States."

Now let us see what the treaty for equal rights, negotiated, concluded and signed in the Montevideo Conference, by the duly authorized representatives of Uruguay, Paraguay, Ecuador and Cuba, would require of the United States when they adhere—as we hope and pray they may—to the enacting article by which the contracting, or non-signatory but adhering, States "agree that upon the ratification of this treaty, men and women shall have equal rights throughout the territory subject to their respective jurisdictions."

Now the amendment before the Congress, proposed in honor of Lucretia Mott, has for its purpose, in the language of its proponents, "to secure for women complete equality with men under the law and in all human relationships." And the purpose of the four-power treaty, is it not identical?

We may suppose that the framers of the amendment may have considered that the power to grant equal rights to men and women was reserved to the

States. If so, Congress could not accord to men and women equal rights throughout the United States; but according to Secretary of State Livingston's pronouncement—which, I am glad to repeat, embodies our practice—the United States could negotiate an equal rights treaty in the first instance, or adhere to such a treaty already negotiated, which permitted adherence. Then, in accordance with the migratory birds decision—still following Secretary of State Livingston's pronouncement—Congress would have power to enforce the treaty conferring equal rights upon men and women throughout the United States and every place subject to their jurisdiction. For did not Secretary of State Livingston indicate in his brief exposition "the remedy, which a treaty between two Nations [indeed between all nations] would effectually apply"? Such a treaty, made "under the authority of the United States," would be valid; an act of Congress to carry its terms into effect would be valid; and the women of the United States, without the modification of a legal right of their fellow countrymen, would be raised from their humiliating and degraded position to legal equality with their erstwhile superiors. In the language of Abraham Lincoln, and following his example, "Let us have faith that right makes might; and in that faith let us to the end, dare to do our duty as we understand it." [18]

There is nothing like the criticism of an opponent, provided he be able and well informed, to show the nature, the purpose and the extent of powers granted in a document which he himself opposes. No critic could have had a greater interest nor have been better informed than Richard Henry Lee, who had moved the Declaration of Independence in the Continental Congress, accompanying it by a motion to conclude alliances with foreign countries; for he knew that the Declaration of Independence could only be rendered effective through the conclusion of treaties. There was no power hidden from his keen and searching eyes. He laid bare the treaty-making power, before the general public as well as before its advocates, in order that the public should be conscious of the extent to which the treaty-making power might abrogate the laws of the United States through international agreements and might also interfere with the exercise of the internal powers of the States and of the Federal Government itself. Therefore it is fair to presume that the proponents of the treaty-making power were fully aware of the nature and extent of the power which they were advocating, and that the public, through Richard Henry Lee, was equally well informed. Yet the treaty-making power contained in the draft of the Constitution submitted to the specially called conventions in the States for its consideration and eventual ratification, while opposed, was not amended; and the treaty-making power of today is the treaty-making power of 1787 as contained in the Constitution, as interpreted by Richard Henry Lee and as understood and accepted by its proponents. Therefore I quote three paragraphs from the fourth of Richard Henry Lee's

[18] Address of Abraham Lincoln before the Cooper Union, New York City, Feb. 27, 1860.

*Letters of a Federal Farmer*, dated, not inappropriately, on Columbus Day, 1787; which were "a sort of text book for the opposition" [19]:

> There are certain rights which we have always held sacred in the United States, and recognized in all our constitutions, and which, by the adoption of the new constitution in its present form, will be left unsecured. By Article 6, the proposed constitution, and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.
>
> It is to be observed that when the people shall adopt the proposed constitution it will be their last and supreme act; it will be adopted not by the people of New Hampshire, Massachusetts, &c., but by the people of the United States; and wherever this constitution, or any part of it, shall be incompatible with ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away: And not only this, but the laws of the United States which shall be made in pursuance of the federal constitution will be also supreme laws, and wherever they shall be incompatible with those customs, rights, laws or constitutions heretofore established, they will also entirely abolish them and do them away.
>
> By the article before recited, treaties also made under the authority of the United States, shall be the supreme law: It is not said that these treaties shall be made in pursuance of the constitution—nor are there any constitutional bounds set to those who shall make them: The president and two-thirds of the senate will be empowered to make treaties indefinitely, and when these treaties shall be made, they will also abolish all laws and state constitutions incompatible with them. This power in the president and senate is absolute, and the judges will be bound to allow full force to whatever rule, article or thing the president and senate shall establish by treaty, whether it be practicable to set any bounds to those who make treaties, I am not able to say; if not, it proves that this power ought to be more safely lodged.
>
> The federal constitution, the laws of congress made in pursuance of the constitution, and all treaties must have full force and effect in all parts of the United States; and all other laws, rights and constitutions which stand in their way must yield; . . .[20]

How is it that the nations, having a treaty which apparently binds them to peaceful settlement instead of a resort to force, for the disposition of controversies which arise because of differences of opinion between or among them, must have a new treaty made for the same purpose and in terms similar to, if not identical with, its predecessor—and still another and another treaty, in an ascending series—although each succeeding treaty, binding the con-

[19] Dictionary of American Biography—"Richard Henry Lee," by Edmund C. Burnett (New York, 1933), Vol. XI, p. 120.

[20] Letters of a Federal Farmer, by Richard Henry Lee—Pamphlets on the Constitution of the United States, edited by Paul Leicester Ford (Brooklyn, 1888), pp. 311–312 [pp. 29–30 of original pamphlet].

tracting parties, and in some instances the world at large, would seem to have them do what they have already promised to do? A single treaty, if made in good faith and if executed in good faith, would be sufficient. If the first treaty has not been carried out, or if there are doubts as to its execution, how does the making of another treaty by the same parties and to the same effect justify a hope that the second venture may be more successful than the first; and the second failing, that a third would be more successful than its predecessor?

What is the trouble? The obligation is apparently not entered into in good faith, or it is not kept in good faith; and each successive treaty is therefore but another evidence of the lack of good faith of the contracting parties in each of the treaties to which their representatives have put their hands and seals. These are grave matters; and unless we can introduce into international relations the morality and the good faith which we would like to think permeate the transactions of individuals in private life, the nations are leading, as it were, a treadmill existence—stationary, although going through the motions of progress.

Let us examine some treaties of the Old World and some of the American Continent, in order to see what underlies this *malaise internationale*—as our French friends would say—of which the entire civilized world is a victim.

The first example which we shall take was meant to create—and did actually create—an international obligation. It is none other than the Covenant of the League of Nations. The purpose of the Covenant was to change a world governed by many discordant laws into a world governed by a universal law. By its terms it assured to the members of the League of Nations their territorial integrity and their political independence, as well as the settlement of their various disputes by peaceful means, with the further provision that the force of the members was to be employed against a covenant-breaking member.

The outlawry of aggression affecting either the territorial or the political independence of any and every country was one of President Wilson's cherished ideals. He more than broached the matter in his 1913 address at Mobile; later he mentioned it in an address which he delivered in the session of the Second Pan American Scientific Congress, held at Washington in 1916–17. During this congress he had caused to be prepared the draft of a treaty, whose third article—in President Wilson's own words—was regarded by him as so important that it was to be inserted in the draft of the Covenant without essential modification.

Now if a nation were not to commit an aggression, that is, an attack upon another nation, other than in self-defense, it is evident that there would be no conquest, and title by conquest would therefore cease to exist; and the obligation, on the part of the members of the League, not to interfere in the internal concerns of members, meant the renunciation of force on the part of member nations in international relations and in the municipal affairs of any state subscribing to the Covenant. Then, too, the peaceful settlement of their disputes and the obligation on the part of all members of the League to unite as

a single entity against a covenant-breaking member was intended to establish the reign of law and the reign of peace, with force to be employed only in the service of both.

It was doubtless President Wilson's belief that the Covenant would usher in an era of peace, if only it should be observed. To many it seemed that this treaty of itself, with its provisions for peaceful settlement—providing,,indeed, for a Permanent Court of International Justice between the nations, and permitting war only if inevitable—was indeed designed to reintroduce that felicity said to exist before the fateful consequences

> Of Man's first disobedience, and the fruit
> Of that forbidden tree whose mortal taste
> Brought death into the world, and all our woe.

We might think that this design, matured by constant thought, expressed at various times and to the same purpose and finding its permanent form in the Covenant of the League of Nations, solemnly accepted by the vast majority of the nations, would influence and even control their conduct, making evident in their relations with one another a new and a better international life. But within a few years, we find a second obligation in the form of a treaty—the so-called Geneva Protocol—again renouncing aggression, an act which would seem to have been outlawed with sufficient clearness in the Covenant, and expressing a renewed determination to banish aggression as well as war from the world. However, Great Britain, the most influential of the Powers, first agreed to and then rejected the proposed treaty, which, although intended to render effective the Covenant, remained but a proposal.

The failure of the protocol resulted in the "triumph" of Locarno—an agreement of various Powers of Europe that they would not resort to aggressive war but that they would submit all their disputes, which diplomacy had failed to adjust, to judicial decision, to conciliation or, eventually, to the Council of the League of Nations. This so-called Treaty of Mutual Guarantee between the United Kingdom, Belgium, France, Germany and Italy was concluded on October 16, 1925. Here we have a series of treaties made at Locarno by members of the League of Nations—but not in their capacity as members —primarily intended to prevent aggressive war, yet the Covenant had already bound the members of the League "to respect and preserve as against external aggression the territorial integrity and existing political independence of the members of the League." Now if the contracting parties had accepted the obligations of the League and had meant to carry them out in good faith, why should some of them find it necessary to conclude among themselves the Pact of Locarno, in effect renouncing the general guarantee of all for a specific guarantee of a chosen few?

We now come to the Pact of Paris, called the "Kellogg Pact" by the people of the United States, in honor of Secretary of State Kellogg, whom they credit with having concluded it; often called by our French friends the "Briand

Pact," because of his coöperation in its conclusion; called by those conservators of justice who wish to honor both without sacrificing either, the "Kellogg-Briand Pact" or the "Briand-Kellogg Pact"; but officially called the "Pact of Paris" because of its signature on the 27th day of August, 1928, in the French Ministry of Foreign Affairs at the Quai d'Orsai. The Pact of Paris consists of three parts: the preamble states its purpose, the first article is a renunciation of war as an instrument of national policy on the part of each of the contracting nations, and the second is a commitment on the part of all of the contracting Powers to settle all their disputes, of whatever kind, by pacific means.

First of the preamble. The contracting Powers express themselves as "deeply sensible of their solemn duty to promote the welfare of mankind" and as "persuaded," "convinced" and "hopeful," to quote the first words of each of the four paragraphs of the preamble, which should, for the present purpose, be set forth *in extenso:* Deeply sensible of their solemn duty to promote the welfare of mankind. Note the word "duty," indeed the "solemn duty."

> Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated.

The "duty," as we shall see, leads to the renunciation of war, to the end that the relations of nations shall be peaceable and friendly.

> Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty.

Note that the purpose of the contracting parties is that any change in their friendly relations shall be sought only by "pacific means" and be the result of "peaceful and orderly process" and that warring nations of the future shall be denied the benefits of the proposed treaty.

> Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy.

Note that the nations not parties to the treaty are admitted to its "beneficent provisions" through adherence and that the apparent "common renunciation of war" is the realization of the "duty to promote the welfare of mankind."

Now the first article is not, as it were, a contract creating an obligation; it is a declaration by each of the signatory parties condemning and renouncing for itself war "as an instrument of national policy." However, the official text, rather than an analysis, should be given.

> The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

The second article is a treaty and contract, or, if the term be stronger, a compact to render fully effective the renunciation of war to which all of the fifteen contracting parties had agreed. The terms of the treaty, contract, compact or obligation—whichever term be considered most acceptable—follow:

> The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

The original signatories of the Pact of Paris were fifteen in number, all of which ratified the treaty. By subsequent adherence the number of contracting parties has been increased by 47 states. Therefore the pact is the law of no less than 62 states. There are still five countries—Argentina, Bolivia, Brazil, El Salvador and Uruguay—which have yet to complete their adherence.

To sum up. Here we have three agreements by the Powers to do apparently the same thing—renounce war in their mutual relations in behalf of peaceful settlement, notwithstanding Articles 10 and 12 of the Covenant of the League of Nations containing guaranties of the territorial integrity and the political independence of every member of the League of Nations, with a solemn agreement to submit to peaceful settlement any dispute between members likely to lead to war. And the signatories of these three agreements were in most instances members of the League.

Why this continued iteration and reiteration? Apparently because of the fear of the parties to each agreement that the previous ones have not been enacted, or will not be executed, in good faith. But if good faith be lacking in the first and the second and the third and the fourth, how can it be expected that a fifth assertion of the same obligation will be more efficacious than the previous peaceful protestations? It is to be feared that each successive promise will be a thing of paper, unless the nations are permeated by the moral standard of individuals in their mutual relations, and unless they face and accept the fundamental truth that, while the stipulations of a treaty are indeed of human origin—that is, of the contracting parties—the obligation to carry the treaty into effect is an obligation under the law natural, always existing and everywhere prevalent, which no country in the world has power legally or morally to violate.

There are certain things which neither men nor nations can touch or abrogate. One is a legal obligation; the other is a moral obligation. And no treaty, or pact or law creating an obligation is, or can be, a law and deserving of execution, unless it be in accord with that thing which President Cleveland called "private international morality," and which Christendom

finds set forth in detail in the New Testament. But whether the treaty or pact or law be legal or moral or both, it must be executed in letter and in spirit and in impeccable good faith.

The adage *pacta sunt servanda* is not only a legal maxim; it is a rule of the moral law. At the Seventh of the Pan American Conferences, held at Montevideo in December, 1933, some five compacts already concluded were considered: the many-named Pact of Paris; Mr. Bryan's admirable treaties for the advancement of peace (to which we have already referred), in a modified form known as the Gondra Convention of 1923; the Treaty of Conciliation concluded at Washington in 1929; the Arbitration Treaty, also concluded at Washington in the same year; and finally, the Anti-War Pact drafted by Carlos Saavedra Lamas, the present distinguished Minister of Foreign Affairs of Argentina, in order to carry into effect the obligations of previous treaties and to banish war from the Western Hemisphere. These several compacts formed the subject of a unanimous resolution. By the terms of this resolution member states of the conference which had not signed or had signed but not ratified the treaties in question were invited to adhere to or ratify them. The Anti-War Pact was presented prior to the Montevideo meeting to the various South American nations and was signed in advance of the conference by some five of those republics. It was laid before the conference for signature and signed by every one of the attending Powers. And the purpose of the resolution and of the pact is that America should, so to speak, be set as a world apart and dedicated to peaceful settlement.

But again we are met by the same question: Why these various American pacts, each of which provides a means of peaceful settlement and each of which, if carried out in good faith, would seem to have been sufficient in itself to obviate war and preserve peace? The Bryan treaties, in the form adopted by the Fifth of the Conferences of American States held at Santiago de Chile, and known as the Gondra Convention, provided for a commission of inquiry; the Treaty of Conciliation of Washington provided for adjustment through conciliation; the Arbitration Treaty created the apparent obligation to arbitrate, and provided, in the case of a dispute involving internal questions which might not ordinarily be submitted to arbitration, that international law, not the views of the contracting parties, should determine whether it should be submitted to arbitration or not; the Pact of Paris—universal as well as American—apparently renounced war and obligated every one of the contracting parties to peaceful settlement; and the Anti-War Pact provided detailed ways and means for the preservation of peace with the express outlawry of title acquired by conquest.

Again the same question and again the same answer, as old as the New Testament: "Almost thou persuadest me to be a Christian." "Almost" is fatal. It should be "wholly" a Christian—not Christian in the sense of doctrine, but in the sense of morality in action, as in any and all of the great religious systems of the world.

A single standard of law; a single moral standard: good faith between nations as between individuals; with these peace is possible—indeed inevitable; without them—

The PRESIDENT. We have with us this evening a very distinguished speaker, one who has held many offices of trust under the Government of the United States, and who, for years past, has had the great good fortune to be the accredited representative of the twenty-one American Republics in their international relations as Director General of the Pan American Union. I am exceedingly happy to be privileged to introduce him to you this evening, not merely because he will enlighten all of us, but because when I was a youngster many years ago we both were in the Philadelphia High School together. We wandered our various ways; he being a home product, went to the University of Pennsylvania; I went to a New England college to the North. A few years later we met in a restaurant in Berlin, since which time we have lived, worked and fed together. May I present Dr. Rowe.

## THE SIGNIFICANCE OF THE SEVENTH INTERNATIONAL CONFERENCE OF AMERICAN STATES

By L. S. ROWE

*Director General of the Pan American Union*

The Seventh International Conference of American States presents a curious paradox in the history of international assemblages. It would be difficult to imagine circumstances less favorable to success than those under which the Seventh Conference met. Coming as it did on the heels of a series of failures of international congresses, failures that had undermined the faith of the peoples of the world in this approach to the solution of international problems, the outlook during the months immediately preceding the conference was none too roseate. To add to the difficulties of the situation, these months witnessed the development of a serious difference between Colombia and Peru and the recrudescence of the armed conflict between Bolivia and Paraguay. The Foreign Offices of the American Republics were beginning to inquire whether it might not be best to postpone the conference to a more favorable period. A spirit of pessimism became apparent and it looked for a time as if postponement would be inevitable.

When the conference finally met, much to the surprise of everyone it became apparent that the very circumstances that seemed a menace to success proved to be the influences leading to constructive results. The Chaco conflict and other disquieting differences relative to the observance of treaties and the definition of boundaries proved to be unifying influences, eliminating minor differences and emphasizing as never before the essential unity of interest of the American Republics. At Montevideo the assembled delegations saw more clearly than ever before that democratic institutions cannot develop

in an atmosphere of international insecurity. The spectacle of the breakdown of democracy in Europe, combined with the lessons of experience in America, were driving home a profound truth, hitherto in large measure ignored, namely, the far-reaching influence of a country's international position on the development of her domestic institutions. The delegates at Montevideo saw clearly that if democratic institutions are to develop normally on this continent, we must free ourselves from the fear of aggression. It was the perception of this fact that contributed so much toward the development of the spirit of unity and solidarity which distinguished this conference from its immediate predecessors. The impact of this fact made it clear that if democratic institutions are to have their normal development in America, national ambitions must be subordinated to the requirements of international order.

The inaugural session of the conference was held on the afternoon of Sunday, December 3rd last. Twenty of the twenty-one republics of the American Continent were represented, Costa Rica being the only country which did not send a delegation.

At this session, the President of Uruguay delivered what proved to be the key-note address of the conference. In stirring phrase, he pointed out that the conference was meeting at a time when two sister republics were engaged in a conflict which involved the sacrifice of many lives and that it was unthinkable that an international assembly, whose main purpose is to maintain the tradition of peace and good will on the American Continent, should ignore the existence of such a struggle or should spare effort in bringing it to a close. "The noble juridical tradition of America," said President Terra, "cannot remain buried in the swamps of the Chaco; the noble covenants that united us in the past cannot be allowed to become mere declarations."

Although the question pending between Bolivia and Paraguay was not on the agenda, it was evident to all the delegates that the problem was one that could not be ignored. It was also clear that the moment the conference addressed itself to the most important question on its agenda, *viz.*, the machinery for the maintenance of peace, it would have to deal with the existing conflict. The situation was somewhat complicated by the fact that the League of Nations had taken definite steps through the sending of a special commission to effect a peaceful solution. The conference was anxious to avoid any action that might interfere with the work of the League, and indicated at the outset that what it desired was to coöperate in every possible way.

Throughout the period of the conference, this undeclared war between Bolivia and Paraguay received preferential attention. It would, I think, be difficult to find another instance in which greater moral pressure has been brought to bear upon two countries to settle their differences. When finally an armistice was agreed upon it was felt that the end of the armed conflict was in sight. Although these hopes proved illusory and unfortunately the

conflict was resumed at the end of the armistice period, the action and attitude of the conference are of real significance, indicating a deep sense of continental responsibility for the maintenance of the peace of this continent. I should be tempted to say that this was the outstanding characteristic of the conference and, viewing the situation in its broadest aspects, one of its most notable achievements.

It is true that from time to time armed conflicts have occurred on the American Continent for which individual governments or groups of nations have endeavored to find a peaceful solution. But at the Montevideo Conference we had for the first time the inspiring spectacle of the Republics of America treating the conflict between two sister nations as a matter which directly affected their well-being and which involved a definite responsibility on their part. It is difficult adequately to picture the deeply moving moments of the conference when the Bolivian-Paraguayan conflict was under consideration. Although permanent cessation of hostilities was not achieved, the moral effect of the demonstration of continental solidarity at Montevideo is certain to be far-reaching.

In view of all these circumstances, it is not surprising that the conference gave preferential attention to the machinery for the maintenance of peace. The American Republics, especially since the Santiago Conference of 1923, have built up an elaborate machinery for the peaceful settlement of international disputes. The Gondra Treaty, signed at the Santiago Conference of 1923, has been supplemented by the Conciliation Convention of 1929 and the General Treaty of Inter-American Arbitration of the same date, together with a Protocol of Progressive Arbitration. The Montevideo Conference supplemented these instruments with an additional protocol, intended to give permanent character to the commissions of investigation and conciliation provided for by the Gondra Convention of 1923. These instruments were further supplemented by the signing of the Anti-War Pact which was proposed by Argentina and which, prior to the conference, had been signed by a number of Latin American countries. In view of this fact, the Anti-War Pact was placed on the table of the conference for the signature of those countries that had not as yet affixed their signatures.[1]

A further step taken was to urge upon all the countries that had not as yet ratified the Gondra Convention of 1923 and the Inter-American Conciliation and Arbitration Conventions to do so with the least possible delay. The Kellogg-Briand Pact was included in this blanket recommendation.

With your permission, I should like to depart for a moment from the record of achievement of the Montevideo Conference to say a word relative

[1] It may be added that on April 27 adherences to this pact were deposited in Buenos Aires by plenipotentiaries of the United States, Bolivia, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, and Venezuela. The original signatories of the treaty were Argentina, Brazil, Chile, Mexico, Paraguay, and Uruguay.

to the attitude of the delegates toward this question of the machinery for the maintenance of peace. I am tempted to do this because it throws considerable light on a basic problem in which we are all deeply interested and as to which there exists considerable difference of opinion.

The delegates nursed no illusions as to the efficacy of mere machinery unless the motive power is furnished by a sincere "will to peace" on the part of the nations involved. What, however, was deeply significant was the doubt entertained as to whether the real "*will to peace*" exists. There was, it is true, a belief in the general desire of the masses of the people for peace, but great doubt was expressed as to whether they are willing to pay the price that the maintenance of peace requires. As one of the delegates truly said: "Peace must be paid for as well as war." It means a spirit of compromise, a willingness to share advantages with others, and a broad and enlightened view of the real requisites of national progress and prosperity. All of these requirements are difficult to reconcile with the spirit of nationalism which has made itself so strongly manifest in recent years.

Closely related to the question of the organization of peace is the codification of international law which, in one form or another, has occupied the attention of all the Pan American Conferences, but to which preferential attention has been given since the Third Conference at Rio de Janeiro in 1906.

Two aspects of this question were dealt with by the Montevideo Conference. Consideration was first given to the projects of codification prepared by the Executive Council of the American Institute of International Law. The projects finally adopted covered the following topics:

(*a*) *Nationality,* with reservations by the United States, El Salvador, the Dominican Republic, Uruguay and Mexico.

(*b*) *Extradition,* with reservations by the United States, El Salvador and Mexico.

(*c*) *Political Asylum.* In view of the fact that the United States does not recognize or subscribe to the doctrine of asylum as part of international law, the delegation of the United States refrained from signing this convention.

(*d*) *On the Teaching of History.* Because this is a matter without the jurisdiction of the Federal Government, the delegation of the United States refrained from signing this convention.

(*e*) *Convention on the Nationality of Women,* with reservations by Honduras, El Salvador, and the United States. The Convention on the Nationality of Women adopts the principle that there should be no distinction based on sex in regard to nationality in the legislation and in the practices of the governments, signatories to the convention. Unanimous approval of this convention marks a distinct step forward in the long struggle to secure equality of rights as between men and women. It was largely through the efforts of the Inter-American Commission of Women, established by the Santiago Conference of 1923, that this result was accomplished. It was also

through the efforts of this commission that a resolution was adopted by the conference recommending that the governments, members of the Pan American Union, establish, to the extent permitted by local conditions, equality of civil and political rights as between men and women. In addition, an "Equal Rights Treaty" was placed on the table of the conference for the signature of such delegates as might have instructions to that effect. This treaty, under which the contracting states agree that men and women shall have equal rights "throughout the territory subject to their respective jurisdictions," was signed by the delegates of Cuba, Ecuador, Paraguay and Uruguay.

(*f*) *Convention on the Rights and Duties of States.* This convention received more attention than any of the others considered by the conference. This was due to the fact that Article B provides that "No state has the right to intervene in the internal or external affairs of another." Since the Santiago Conference of 1923, this question of the so-called right of intervention has hung like a cloud not only over the Pan American Conferences but over Pan American relations in general. The last quarter of a century has witnessed a gradual crystallization of Latin American opinion against the assertion of any such right. Here in the United States during the last decade there is also noticeable a marked current of opinion in the same direction. At the Havana Conference of 1928, the delegation of the United States was not prepared to accede to a general declaration against intervention, which was sponsored at that time by most of the Latin American Governments, and which would have undoubtedly received the support of all had the matter come to a vote. In the absence of unanimity, it was deemed best to postpone consideration until the assembling of the Seventh Conference.

At Montevideo it was evident that such a declaration would be adopted with or without the assent of the United States. Fortunately, the situation was such as to make it possible to secure unanimity. The assent given by the United States as set forth in a statement by Secretary Hull was further strengthened by a subsequent declaration by the President of the United States in which, in no unmistakable terms, the policy of non-intervention was made an integral part of the policy of this government. "It therefore has seemed clear to me as President," said President Roosevelt, "that the time has come to supplement and to implement the declaration of President Wilson by the further declaration that the definite policy of the United States from now on is one opposed to armed intervention."

The declaration made by Secretary Hull, combined with the important changes in the recognition policy of the United States announced by Secretary Stimson, created the impression at Montevideo that the present policy of this government is to respect to the fullest extent the sovereignty and equality of the Latin American States. Direct as well as indirect interference in their internal affairs, which has been the source of so much irritation, is to cease. As President Roosevelt said, "The maintenance of constitutional government in other nations is not a sacred obligation devolving upon the United States

alone. The maintenance of law and the orderly processes of government in this hemisphere is the concern of each individual nation within its own borders first of all." Hereafter, therefore, we may assume that the contribution which the United States will make to constitutional government will be by her example rather than by precept or compulsion, moral or physical.

In addition to considering the specific projects of codification above referred to, the conference also gave considerable attention to the future procedure to be followed in the codification of international law. The resolution as finally adopted provides, in the first place, that the International Commission of Jurists, created by the Third International Conference of American States held at Rio de Janeiro in 1906, shall be maintained. Furthermore, each of the governments, members of the Pan American Union, shall create a national commission on codification of international law which shall be made up of qualified officials or ex-officials from the respective Foreign Offices, and by professors or jurists who specialize in international law.

There is also created a special Commission of Experts to which is entrusted the preparatory work of codification. This commission is made up of seven jurists to be chosen as follows: Each of the twenty-one governments, members of the Pan American Union, is to send to the Union a list, not to exceed five persons. The lists thus sent in after being compiled are to be submitted to the respective governments. Each government shall designate from this list seven persons of whom only two shall be nationals of the country thus designating. The seven persons who obtain the highest number of votes shall constitute the Commission of Experts. It is the duty of this commission to examine all problems of private and public international law and to make a list of those matters which it considers susceptible of codification. The commission will then proceed to draw up a questionnaire which will be submitted to the consideration of all the national commissions on codification. When the replies to the questionnaire have been received by the Commission of Experts and when this commission has had an opportunity to prepare a reasonable number of projects or declarations such as to justify a meeting of the International Commission of Jurists, a notice thereof is to be sent to the Governing Board of the Pan American Union which in its turn will then convene the commission. The results of the work of this commission will then be submitted to the next International Conference of American States. The resolution further provides that the Pan American Union shall establish a juridical section which is to serve as the general secretariat of the commission.

Another important step forward taken by the conference was to give an economic content to Pan Americanism. In his address at the opening session, President Terra of Uruguay said:

> I had the honor to represent Uruguay at the Financial Conferences of Washington in 1915, and of Buenos Aires in 1916, and to defend before them a proposal of the delegation of my country, adopted unanimously, whereby the Republics of America were to grant to one another

reciprocal customs facilities, seeking through all means, free from suicidal shortsightedness, the disposal of the excess of production of each one. This proposal, accepted in both congresses, far from having been enforced, has been attacked and thwarted by antagonistic policies, and it is mainly because of this reason that we have a *dislocated and dismembered* commercial structure in the Americas.

At the Havana Conference of 1928, the first attempt was made to incorporate into the Pan American system the principle that the acceptance of the doctrine of the essential unity of interest of the American Republics must be accompanied by the removal of artificial barriers to inter-American trade. This doctrine at the time aroused but little enthusiasm, but during the five years that elapsed between the Havana and Montevideo Conferences the obstacles to commerce had become so numerous and, in some respects, so disastrous, that it became evident that serious international irritation would arise unless something were done to remedy the evil.

Until the recent conference, the United States had always maintained that the question of tariff barriers was a matter of purely domestic concern and that we could not and would not tie our hands in any way with reference to the raising or lowering of such barriers. In fact, there was even a marked disinclination on the part of the United States at past Pan American Conferences to enter into any discussion of tariff policies. At Montevideo, however, it was upon the initiative of the delegation of the United States that a declaration was unanimously adopted calling upon the Governments of the American Republics to adopt a policy of tariff reduction together with the elimination of other artificial barriers to international trade. The declaration was necessarily general in character because it was manifestly impossible at a conference of twenty republics to formulate anything in the nature of specific reciprocal trade agreements. The implications of the general principles unanimously adopted by the conference are, however, clear and unmistakable.

In order further to stimulate the movement for economic coöperation, the conference provided for the assembling, at an early date, of a Financial Conference at Santiago, Chile, to be followed by an Economic Conference at Buenos Aires, Argentina. The steps thus taken toward an economic interpretation of Pan Americanism are likely to have a far-reaching influence on the agenda of subsequent conferences.

I would burden you unduly were I to attempt a detailed recital of the content of the ninety-four resolutions and seven conventions adopted by the conference. All tend to promote coöperation between the American Republics in different fields of national endeavor. While some look to closer economic relations, others aim to foster the development of currents of intellectual interchange and coöperation. In most cases, the duty of giving effect to these resolutions is entrusted to the Pan American Union and definite steps have already been taken toward that end.

The recital of the concrete achievements of the conference does not, how-

ever, give the full measure of its significance. In fact, its larger significance is to be found in the intangible rather than in the concrete. Every one who has attended international conferences is aware of the importance of what is known as "the atmosphere" of a conference. In this respect, the Montevideo Conference occupies a position of exceptional significance, especially when considered from the point of view of the attitude of the Latin American countries toward the United States. It is a well known fact that these conferences have offered the opportunity and have been the occasion of both open and covert criticism of the foreign policy of the United States. At the Montevideo meeting for the first time in the history of these conferences this spirit of criticism was almost completely absent.

In judging the results of any one of the International Conferences of American States it must always be borne in mind that a different standard should be applied to these conferences from that with which we judge such international assemblies as the London Economic Conference or the Disarmament Conference. The Pan American Conferences meet at stated intervals. Each conference contributes its share in a larger or smaller measure to the development of closer coöperation between the Republics of America. It is a mistake to expect any one conference to accomplish spectacular results and it is even doubtful whether such results are desirable.

We have now had seven such conferences, each of which marks a distinct step forward in the growth of Pan American unity, and it will be from such accretions to the sum total of international effort that the Pan American system will gradually be strengthened. The accomplishment of permanent results must necessarily be slow, but the record of the forty-five years that have elapsed since the assembling of the Washington Conference in 1889 is full of encouragement to those who have labored in the past, and full of promise to those who will be called upon to carry on the work in the future.

The PRESIDENT. We shall now proceed to the election of a Committee on Nominations. Does the Chair hear a motion in respect of such appointments?

Mr. CHARLES HENRY BUTLER. I offer the names of Mr. George T. Weitzel, Mr. Clyde Eagleton, Mr. William J. Price, Mr. Charles G. Fenwick, and Senator Elbert D. Thomas.

A VOICE. I second the nominations.

The PRESIDENT. Are there any further nominations? Has any person the desire to present a list of names for the committee? (After a pause.) It has been moved and seconded that the nominations be closed, and that the Secretary cast a single ballot for the nominees. The Secretary has cast the ballot, and the members nominated by Mr. Butler have been duly elected as the Committee on Nominations.

It is not yet 10 o'clock, and there is ample time for discussion, if it be desired. The Chair recognizes Professor Fenwick.

Professor CHARLES G. FENWICK. I have so much respect for Dr. Rowe, that I trust he will not mind if I make a few comments upon his address which may not seem to carry the admiration which I really have for him. When he told us, quoting the words of the delegates, that democratic institutions can not be developed in an atmosphere of international insecurity, my hopes were raised; when he went on to say that we must free ourselves from the fear of aggression, I began to take further hope; perhaps something had happened I had not read about in the press. Perhaps the United States had signed with the Latin American States an Article 10 of the Covenant of the League of Nations, guaranteeing territorial boundaries; perhaps it was Article 11, accepting the collective responsibility of the Americas; or perhaps it was that the United States had signed an Article 16 of the Covenant, applicable to the Americas. But it seems that was not the case.

We are told that too much attention has been paid to the machinery of peace; I think rather that it has not been emphasized enough. I am not in favor of non-intervention; I believe we ought to have intervention, but of a collective character. To me, it is a disgrace that a war should be allowed to go on in South America today. I am not interested in non-intervention; I am interested in collective intervention in stopping the war.

With what instruments is that war being fought? Everybody knows that if Bolivia and Paraguay depended upon their own munitions they could not carry on the war; they could not carry on the war three weeks longer unless they got munitions from the outside. A war is going on in South America and the United States is doing nothing about it. There is no Article 10, no guarantee of territorial integrity, and no question of sanctions.

Mr. Chairman, in your closing words you emphasized the necessity for the observance of treaties. I submit that is the fundamental thing. Cicero saw it and emphasized it, *Pacta sunt servanda*. But we must not only see that treaties are kept, but that certain bad conditions created by past treaties are remedied. We are making no effort to remedy the bad conditions in South America.

I submit the war in the Chaco could be stopped in three weeks if the United States would take the leadership in remedying the wrongs which have led to the war. It is not a question of boundaries in what they call the "Green Hell"; it is a question of the access of Bolivia to the Atlantic, of the distribution of raw materials. Can not we face the constructive problem of solving what has been Bolivia's grievance? Mr. Chairman, we all know the fine, constructive work that has been done at Montevideo. But I think the United States should go further and take its share in stopping that war by constructive remedies.

Dr. ROWE. May I say a word with reference to the statement by Dr. Fenwick. In the first place, as regards the efforts to bring to a close the Bolivian-Paraguayan conflict, it must be remembered that for a period of four years the United States spared no effort to accomplish this purpose. When it comes to a question of joint armed intervention, it is important to consider

the attitude of our own people toward such a policy. Even if our troops were to be sent with soldiers of other countries, could any administration face the public outcry certain to follow any declaration of policy which involved sending our soldiers thousands of miles from home into the Chaco, many if not most of whom would die of disease. It is well to talk about putting a stop to it, but when you come to the physical problem of putting an end to the war you find not only that you have grave and very difficult problems to solve but that you have a local public opinion in the respective countries that will not stand for it. Public opinion in the United States will say: "We will make every effort to stop the war, short of sending our men."

I sympathize with Dr. Fenwick's desire to see that conflict brought to a close. I do not see any possibility of joint intervention, largely because the people will not stand for it. They are not going to have their young men killed in those remote regions for the purpose of stopping the people of Bolivia and Paraguay from killing each other. That is the situation that faces any government contemplating joint intervention. Short of such intervention, as far as moral pressure is concerned, everything that can be done is being done.

As far as the possibility of cutting off war supplies from those countries is concerned, you must remember that a great portion of their supplies come from Europe; that many of the credits come from the same source. The problem is not as simple as Dr. Fenwick seems to suppose, although I sympathize with the ultimate purpose which he has in view.

Professor FENWICK. Obviously, I have no thought of having American boys die in the marshes of the "Green Hell." I remember that on a famous occasion some fourteen years ago, a Senator from Illinois announced to the United States, "I will not have the American boys dying in the marshes of Hungary or climbing the steep peaks of the Himalayas." Apparently he thought that the guarantees of Article 10 might cause the American boys to die in the marshes of Hungary, but he never explained why they were going to climb the steep peaks of the Himalayas.

No one wants to send American boys to the "Green Hell." If the League of Nations is prepared to enforce an embargo on the shipment of arms to the two belligerent countries, and if the United States would join in, there would be no difficulty. I submit that the League would have done so before this but for the fact that the United States would not join in.

The PRESIDENT. Is there a desire on the part of Dr. Rowe to answer Dr. Fenwick? If not, we shall adjourn until tomorrow morning at 10 o'clock. Mr. Finch, interrupting in the midst of my eloquence, says that a reception will be held here immediately after adjournment this evening.

Before adjourning, I wish to read the following radiogram just received from Dr. Walter Simons, of Berlin, President of the German Society of International Law:

"Best wishes for successful meeting of your Society. Simons."

(Thereupon, at 10:20 o'clock p. m., the session adjourned to meet again at 10 o'clock a. m., Friday morning, April 27, 1934, at the Willard Hotel.)

## SECOND SESSION

**Friday, April 27, 1934, 10 o'clock a. m.**

The session was called to order at 10 o'clock a. m. by Dr. JAMES BROWN SCOTT, President.

The PRESIDENT. Ladies and gentlemen: This morning we will take up the question of the international regulation of tariffs, and Professor Martin, of the University of Washington, will present the first paper, after which it will be open to discussion.

Professor CHARLES E. MARTIN. Mr. President, and members of the Society: I shall take the privilege of summarizing my paper rather than reading it, because the subject is too comprehensive and the paper is too long. I will occasionally read sections from it, but, in the main, I will attempt to summarize it. I approach the subject with a certain amount of modesty, because I realize it lies in the field of economic science as well as in the field of international law.

## THE INTERNATIONAL REGULATION OF TARIFFS

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On the banks of Lake Chuzenji, above the beautiful Nikko, where the Tokugawa shrines are located, two Japanese jinricksha men were conversing in their own language, awaiting their human burdens—foreign diplomats escaping Tokyo for a holiday. An American who understood Japanese caught some of their words, and listened intently. What the American interpreted to his friends created a lasting impression on those who heard it. One laborer had expressed to the other his interest in continued prosperity in America. Should the tourists not come, his jinricksha trade would suffer to the point of the complete loss of his business. Several of his sons and sons-in-law were engaged in various occupations in the production of silk in Japan. Should American women feel the depression so keenly that they must discontinue wearing silks, Japan's great export trade to the United States would cease, and thousands of people, including his own family, would be thrown out of employment. And, should a war between the two countries unhappily come, trade between them would be cut off, with the same result. Accordingly, he hoped that the Ministers of the Government would have the good judgment and sufficient concern for their people's welfare which would result in a policy of peace and conciliation with the people of the United States. In this simple conversation, a representative of the class of mankind which bears the war burden in blood and treasure, and which pays the most for the doctrines of

political isolation, economic nationalism, and self-containment, had summed up, in a few words, stripped of jargon and theory, the world's economic and political malady; and had, unconsciously, applied the leading principles of world recovery, which statesmen have found so easy to utter, but which states have found so difficult to apply. Such principles were:

1. That the prosperity or poverty of one country affects favorably or adversely the economic welfare of individuals and groups in another, even to the point of economic starvation or destruction, with the affected group powerless to do anything to remedy the situation.

2. That a nation which sells abroad must also buy abroad; that exports imply imports; and that a refusal to interchange goods, either through the failure of the people to buy, or through artificial government policy, will react ultimately and disastrously against those in the non-buying state who depend on export demand for their livelihood.

3. That the flow of capital, through trade, is a natural, normal course, and impediments delay and perhaps destroy the processes of trade, rather than build up and strengthen such processes.

4. That trade is a process of peace, and that war, while increasing trade temporarily in certain directions, brings on dislocations of normal trade channels which are never altogether repaired, and which are more costly over the years than if commerce is allowed to follow its normal and uninterrupted flow.

5. That those who suffer most, in numbers and in degree, are not the ones whose fortunes are bound up in the economics of distribution and exchange so much as those who share in the process of production, especially the farmer and the laborer. It is to be observed that the greatest suffering does not fall on those who follow foreign trade or international exchange as a business, but on those whose livelihood depends on a foreign demand which is shut off or abandoned.

6. That important elements in every country, and especially in every maritime country, varying in number and importance from country to country, have, time out of mind, followed occupations, professions, trades, etc., which depend mainly, if not entirely, upon such goods and services as the country may export abroad. They have their lean years, average years, and boom years. It does not mean, however, that they should, by government action, face economic prostration, much less economic destruction.

Just as the simple teachings of Jesus offer, if embraced, a practical way of life to the individual whose course is complicated by a multiplicity of creeds, cults and doctrines, and by an ecclesiasticism which too frequently devitalizes religion, so the simple lessons of the Japanese jinricksha boy offer us an obvious and workable way out of our economic quagmire, in its international aspects; but like the ecclesiasticism of the day, such natural and normal courses are not only complicated, but are even prevented by a spirit and practice of economic war; by an economic nationalism more terrible than any political nationalism could possibly be; and by artificial barriers in the form

of monopolies, trade unions, quotas, cartels, prohibitions and embargoes, we find the institutions of economics, supported by private interests in most cases, but enforced by the state, making difficult, if not impossible, any economic freedom or prosperity for those whose welfare rests on trade abroad. To rescue the problem from this condition is a bold procedure for the student and scholar, but a daring course for the statesman. Both have against them the tariff history of the United States, and the prevailing practice of the nations of our contemporary world. If we assume that our own past must dictate our future course, or that the present practice must prevail, because such has been and is our course, little is left except that of charting our course by that of our predecessors, including their mistakes. We realize today that a thing is not necessarily right and correct because it is, or has been. Moreover, the course of yesterday or of today may not be the course for the immediate tomorrow.

Our subject cannot be reduced to the narrow terms of a discussion of treaties, nor can it be strait-jacketed within the field of international law, large as this field may be, or even within the larger field of international policy. It touches the domestic as well as the international life of the state, embraces economics as much as politics, policy as well as law, and practical politics as well as economic theory. It also touches state interventionism as well as private enterprise and private interests. And as our interest is in "related subjects" as well as in international law, I assume we must follow the subject where it leads, logically, practically, and historically. Certain considerations of the tariff must be disposed of before we can assume for it a major and not merely an incidental connection with the economic life of the state.

### I. SHOULD THE TARIFF BE A POLITICAL DOCTRINE AND BUSINESS CREED, OR A BALANCED, INTEGRATED PART OF OUR ECONOMIC LIFE?

The tariff question in the United States originated as a fundamental difference in theory as to what our foreign commercial policy should be; developed into a political doctrine which has sustained the two major political parties in the enjoyment of an issue of perpetual duration and fundamental importance; and evolved eventually into the first plank of a "business creed," which has been urged and applied, for party and business reasons, frequently without a regard for the resulting consequences, and also without taking into account economic realities and needs on a national and a balanced scale.

In the field of *theory*, differences on the tariff originated in the conflicting claims of basic interest groups. It was James Madison who, with acute wisdom, discerned the effect of the clash of interests in government, and regarded their regulation, and indeed, their representation the chief function of government. The different and unequal faculties of acquiring property, he argued, resulted in the possession of different degrees and kinds of properties, and the influence of these on the sentiments and views of the respective proprietors resulted in a division of society into different interests and parties. "The protection of these faculties is the first object of government," he significantly

observed. However, he did not overlook the results of the conflict of such interests, nor did he assume that the "protection" which government should afford should leave one class "protected," and another unprotected. No better statement of his position than this has been found:

> The most common and durable source of factions has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.

Such was Madison's view of the effect of interests on our government, and the function of government in relation to them. It was clearly that of regulation and control, toward a balanced and shared prosperity, and stripped of the earmarks as well as the substance of monopoly. Nor did he envisage, at the time of the Constitution, a political majority which would ruin our export market through extreme protectionism, or which would ruin the home market of our manufacturers through a policy of "free trade." A balance of interests was assumed, and the Constitution was supposed to provide the opportunity for this. Each group, through our representative institutions, would, according to Madison, assert its claims, and the Congress, together with the President, would encourage and respect the legitimate ones. The general interest of the people should find representation in the lower house, but this should not extend to mere individuals, or to all interests. The three classes entitled to such representation were the merchants, the landed interests, and the learned professions. The mercantile and agrarian interests would naturally be opposed to each other, as their interests were opposed, and the professional group would exert a mediating rôle, resolving conflicts between them.

The representation of interests, resulting in a balance and a shared protection through a government structure from which parties were in theory eliminated, did not work out. For one thing, Hamilton turned the weight of his political leadership, administrative and financial gifts, and personal influence in the direction of protection of a special rather than a balanced kind, and sought to make the Government of the United States follow a course in keeping with his views. It is true, however, that he regarded his view of protection as carrying benefits to all. Jefferson, holding a contrary view, determined upon the political party as the only effective means through which he could capture control of the government, and change the Hamiltonian view. Accordingly, the tariff became a party matter, and essentially political.

Hamilton's view may be presented in broad outline. To him the stability and certainty of a domestic market was vastly superior to the vicissitudes

and uncertainties of a foreign market. These advantages, so dependable, and so close and convenient, should be reserved and preserved for Americans. Agriculture would prosper through a steady local demand for its products. He centered his philosophy on the effects and results of a diversified system of industry. The more numerous objects produced would be an effective mental stimulus. It would encourage mechanical work and invention, thus developing important intellectual characteristics. Employment would be provided which otherwise would not exist. Immigration would result from such new opportunities, increasing our human resources. He sought to develop an order of economy and society in the United States, which would be fostered and encouraged by a definite kind of commercial policy. He entertained a generous view of the genius of the American people, whose capacities could be developed, and which would respond to the development of material resources, stimulated by government measures, which were in turn determined by private interests. While affording this kind of protection through government, Hamilton rejected it as something belonging to "all-comers," but would apply the principle of selection to the classes and interests he would favor. He would use the power of the state in support of these interests: "five circumstances seem entitled to particular attention: the capacity of the country to furnish the raw materials; the degree in which the nature of the manufacture admits of a substitute for manual labor in machinery; the facility of execution; the extensiveness of the uses to which the article can be applied; its subserviency to other interests, particularly the great one of national defense." Thus Hamilton sought to establish a social system through an economic system, resting on a certain commercial policy. A system of protection, then, was proposed, having as its objective the protection of the American manufacturer and the profits of industry. It must be said in fairness that he also had in mind the welfare of the farmer and the wages of the laborer. They were not, however, foremost in his mind.

Jefferson, like Hamilton, sought to establish an American society, but based on an entirely different political theory, and on a different economic order. He posited his political and economic order on agriculture, which in America should be based on a widely distributed land ownership among the people, as against the vast concentration of land in Europe into great estates. Just as Hamilton believed in the inherent virtue and superiority of the American mechanical, inventing and producing mind, so Jefferson believed in the superior qualities, moral and intellectual, of the agriculturalist. For "Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and are tied to their country, and wedded to its liberty and interests, by the most lasting bonds." The great centers of population of Europe work against these excellent results. The welfare of the country depending on the agrarians, he sought their political support, because they alone were "the true representatives of the great American interest, and are alone to be relied on for expressing the proper American

sentiments." Men who invest, trade, or manufacture were not deeply rooted in the soil, but were attached to the same interests as analogous groups in other countries. They could not, therefore, have that attachment to their own country and its institutions, nor could they represent as could the farmer the genuine interest of the United States. The interests of agriculture also meant a greater independence, security, and self-sufficiency for the country, as opposed to the transitory whims and caprices of customers and traders. In making this country one of farmers, and in keeping the factory worker in Europe, Jefferson and his followers naturally developed a tariff policy in keeping with their agrarian philosophy. The produce of the farms of the United States should be exchanged for the factory products which he would limit to Europe, which trade or interchange should follow a free and normal course. This meant, obviously, the development of a foreign as well as domestic agricultural market, and the purchase of necessary foreign-produced goods, without serious import impediments. Later, Jefferson came to favor such manufactures here as would insure our independence and security, and such protection as would guarantee them. He also later placed the manufacturer beside the agriculturalist in his scheme of things, and looked upon it as somewhat "in the agricultural interests." His party followed suit, advocating a home supply equal to our demands, and especially independence of other nations in the production of those things which are of use in war. However, after 1815 there was a reversion to the original view regarding the tariff of Jefferson and his party, who looked upon it as a special rather than a national interest.

Both Hamilton and Jefferson envisaged political and economic orders which more or less reflected their own interests, regions and environments, as well as their own social and intellectual atmospheres. National commercial policy was accordingly, with each, a mirror of the things each thought should prevail. Neither looked upon the "balance of interests," through representation and government regulation, as suggested by Madison, as the appropriate course. Each sought to make his own economic group, his own political theory, and his own economic order the American one. Each sought to nationalize his own doctrine. That political parties have done so for them, at different stages of our national history, is responsible for the tariff becoming a political football instead of a legitimate economic instrumentality.

The Democratic Party at length became the historic opponent of the doctrine of protectionism. It was looked upon by this essentially agricultural party as the use of the state by intrenched private business and financial interests, as against the rest of the population, especially the farmer. The tariff plank in the Democratic platforms uniformly and frequently condemned the fostering by the Federal Government of one branch of industry to the detriment of another, and cherishing the interests of one portion of the country to the injury of another. In other words, agriculture, according to the Democrats, was subordinated to industry, and the manufacturing north and east

were favored at the expense of the agrarian south and west. It was repeatedly contended that the farmer sold in unprotected markets, and that both the farmer and laborer bought in protected markets. It produced an unequal distribution of wealth, and was a use of the national power for a special, as against the national interest.

The Republican Party clung to the Hamiltonian concept of protectionism, insisting that, along with its admittedly great industrial benefits, it carried with it incalculable benefits to agriculture, and also to labor, a new and growing power in American politics. The "high tariff" became the first and foremost principle in the politician's creed, without which American politics would have been issueless, and the politician without a doctrine. With the preservation of the Union an established and historical fact, protectionism became the peculiar property of Republicanism. Like all political dogmas which have party success chiefly in mind, it was pushed to ridiculous extremes, was applied to commodities which did not need, and in many cases did not desire protection, and became identified in the popular mind with the economic security of the people and of the country.

This tariff-making under party control became essentially sectional, with a special brand of political tactics suited to the issue and the occasion. Consequential protection was afforded to some—to such economic interests as supported the party professing the principle; seeming protection was granted to others as a gesture; and the tariff measures were thus, through bargaining and concessions, voted through the Congress. Down to the Civil War, these opposite interests were well reflected in party positions and activities. Since the Civil War, Republican Party policy and strategy seemed in time to be that of the country, and protectionism gained almost universal support. The States of the South, cotton producing ones, have been kept from alliances with the West through concessions, nominal in effect, but having the appearance of substance, thus building up the interests of the North and East through the tariff. Several things worked into the hands of those following "protectionism," and against those seeking free trade, or a tariff for revenue only. For one thing, the manufacturer displaced the planter in importance, and the products of factories soon overcame in quantity and value those of the farms. Again, population strength and political power centered in the industrial States. Finally, even in the agricultural regions, and especially in the South, cotton mills, sugar factories, etc., neutralized the doctrinaire attitude once entertained in favor of free trade. In recent campaigns, the Democratic Party, while favoring its old tariff principle, has hedged it about with such exceptions that the real position was little different from that of mild protectionism. The Middle West, like the South, became industrialized. Steel, wool, and dairy products in the Middle West, and fruits in the Far West, all crying for protection, did much to break down sentiment for a low tariff. The Fordney-McCumber Tariff of 1922 and the Smoot-Hawley revision of 1930 represented the canonization of protectionism in the United States and its elevation to the

level of a sacrosanct political dogma. Instead of free trade against protection, it was a case of one section and one commodity against the other. While accepting the principle generally, sectionalism was in fact intensified.

As in politics, it also became the leading article of faith in the American business creed. The regimented business interests of the country professed it, and all sections and divisions of organized business embraced it. No business, especially industrial, could be carried on, it was urged, without protection. The American market was regarded by each business interest as its peculiar monopoly in so far as the articles it produced were concerned, without regard to the economic effect on the general consumer, on other lines of industry, and on our export trade. Formerly designed to aid new and struggling industries through a period of infantilism until they could stand alone, it developed into a form of expected permanent aid, which protected businesses came to look upon as a fundamental right, inherent in the nature of the business thus sustained. And as a final consideration, a business economy and economic system which has deified our business civilization and has decried the activities of government, which had as its motto "less government in business and more business in government," and which has posited its entire philosophy on freedom from state intervention, government regulation and control, has used the protecting arm of the state in positive ways in its own behalf, in so far as protection is concerned. Such an illogical and unnatural course cannot be permanent. If industry would claim the succor of government through a monopoly of the home market, it must also submit to the regulation of government.

As an analogue of the business enthronement of protectionism on a national scale, and in keeping with the "Buy American," "Stay-at-Home," and "See Your Own Country First" movements, a species of protectionism and economic nationalism has found its way into the trade relations of the American States, against the spirit, if not the letter, of the Constitution. The trade between the States is presumed to be free and unrestrained. However, a number of States have passed laws directing their governments to give preference to their own State products. It is a dangerous economy, which, if extended, will mean, not only American State against American State, but city against city, and State region against State region. By following a selfish, destructive national policy, tolerable only because of our continental proportions, we have set in motion doctrines and practices of sectional and State self-containment which, though voluntary and unaided by tariff jurisdiction, may wreck the economic foundations of the country. If Washington must use all its own timber, California its oranges, Michigan its automobiles, and Iowa its corn and hogs, what must happen to the huge surpluses meant for out-of-State consumption? What we must do nationally by law, we can do nationally in sections and by States. The very past self-sufficiency which has made the principle of protection possible may prove to be the destruction of our wide-scale market; extending from coast to coast and border to border without a

tariff barrier, it may cause the breakdown of this tremendous national reserve for industry. If the United States can do without Japan or Argentina, nationally considered, may not Texas get along without California or New York? And may not the smaller, interdependent States of the Union so supplement each other that the so-called self-sufficient States would be eliminated from their economic picture?

For the foregoing reasons, we conclude that the tariff has not, in the past, been a balanced, integrated part of our national economic life. It has not, over the years, been applied here, lifted there, softened as regards this commodity and raised as regards that one, in the public interest. Politics and business have made it impossible. The tariff should be as non-partisan and as non-political as any other normal economic measure, and should be used purely for economic reasons, on a basis of a planned economy, and balanced benefits. For this to be so, it must be divorced from its partisan and political moorings, and customary unilateral legislative determination must yield, in some respects at least, to international regulation, on a basis of mutuality.

## II. HISTORICAL AND LEGAL INSTANCES OF CONFLICT DUE TO REGULATION BY MUNICIPAL LAW AND BY INTERNATIONAL AGREEMENT

The Constitution vests in the Congress the right to lay and collect duties, imposts and excises, with the reservation that they shall be uniform throughout the United States, and that no export duties may be levied. Also, Congress was entrusted with the regulation of commerce with foreign nations. From these constitutional provisions, it seems clear: (1) that a system of controlled imports through duties was intended, either for revenue or protective purposes, or both; (2) that uniformity of duties throughout the United States implied a customs union, so to speak, within the confines of the United States; (3) that an export business was intended as a natural thing, and that governmental impediments to exports should be prohibited by fundamental law, on the theory, perhaps, that the receiving country levies the duty or imposes the restriction; and (4) that the regulation of foreign commerce and control of imports should, being legislative business, be committed to the Congress. Constitutionally speaking therefore, foreign trade is the expected thing, and nothing stands in the way of the country having the international commercial policy it seeks, provided the Congress will act. Free trade, tariff for revenue, protectionism, or embargoism are all within the limits of the fundamental law. Not equally wise or sound, they are equally possible under the law.

To literalists, the regulation of the tariff in the United States is solely a matter of unilateral operation, accomplished through municipal law. Some would go so far as to say that what the Constitution grants expressly to the Congress cannot be exercised through the treaty-making or agreement-making power. They would stop here, and would rest their case purely on constitutional grounds. Others would, as a matter of policy, not entrust the regulation of the tariff to our foreign relations' authority for the reason that

international regulation connotes a different purpose and function for the tariff than that found in its regulation by municipal law. In one case it is a matter of bargaining, political maneuvering, lobbying, and voting; in the other is mutuality, a meeting of the minds, a consultation and consideration of the interests of two or more parties.

The proposition that the powers committed to the Congress cannot be dealt with by treaty has long since ceased to have great significance. The treaty power itself is very extensive. Said the Supreme Court in the case of Geofroy *v.* Riggs:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government and that of the State. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.[1]

Several examples of subjects covered by the constitutional powers of Congress, or otherwise provided for, being regulated by treaty or agreement, may be mentioned. Congress is granted power to raise and support armies, and to provide and maintain a navy. The express and exclusive grant of legislative authority is clear. Yet we are committed to the limitation of armament, especially naval, by international agreement. No one has suggested that the London and the Washington treaties limiting naval armaments are invalid interferences with the power of Congress to provide such naval strength as it chooses. Indeed, our naval authorities are using our treaty limits as a standard of national defense which our laws should approach! The admission of aliens to the country, and the control of immigration, are legislative functions, under the commerce clause of the Constitution. However, we have had treaties with foreign countries regulating immigration. The regulation of Japanese immigration by international, although executive agreement, proved to be a much better method than the introduction of the problem into racial and class politics through the Asiatic exclusion feature of the Immigration Act of 1924. Congress may establish a uniform mode of naturalization. The logical outcome of the exercise of this right is the expatriation treaty, providing for respect abroad for our naturalization proceedings. The conditions under which property may be acquired, held and disposed of, is committed by the Constitution to the States, under the doctrine of reserved powers. Disabilities imposed upon aliens by State governments respecting the descent and tenure of property are clearly within the rights of the States. Treaties between the United States and foreign governments removing such disabilities are a constitutional exercise of the treaty-making power, and State laws to the contrary must yield. The treaty power may extend, then, to subjects expressly committed to the Congress, and even to subjects reserved to the States.

[1] 133 U. S. 258, 267.

Such subjects must of course be properly matters of negotiation between the United States and a foreign country. While the foreign relations power cannot unduly interfere with the purely domestic jurisdiction of the country, little is allowed to stand in the way of the national government expressing its international life.

The regulation of the tariff by international means stands on a somewhat different ground, and is limited by an express provision of the Constitution. It is well understood that a treaty stands on the same ground, in law, as an Act of Congress, and that a treaty will repeal a prior inconsistent law. Chief Justice Marshall, in the case of Foster *v.* Neilson, declared: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." [2] However, the Constitution provides that all bills for raising revenue shall originate in the House of Representatives, but that the Senate may propose or concur with amendments, as in other bills. In view of this provision, what can be said of the self-operation of treaties which provide for a modification of the revenue laws of the Congress? In a convention with Great Britain of 1815, equalizing duties payable by British vessels in American ports, and equalizing duties in British products, whether imported in British or American ships, it was deemed necessary to pass a law repealing such acts as were inconsistent with the treaty provisions. In a later statute, giving effect to the provisions of the treaty, it was assumed that the acts of Congress in conflict with the treaty were still in force, and that legislative action was necessary to give effect to the treaty stipulations. A conference committee was appointed to adjust the matter. The Senate conferees urged that this treaty did not call for legislative enactment, as it merely removed the disabilities of British aliens in matters of commerce on a reciprocal basis. The House conferees, however, insisted that a law should be passed repealing any law not in keeping with the treaty. While admitting that legislative aid is not generally essential to the validity of treaties, they urged that in certain cases, including this one, such aid might well be assumed. The House conferees suggested that treaties involving appropriations, laying taxes, raising armies, supporting navies, granting subsidies, creating states, or ceding territory, would require legislative aid to make their provisions effective. The convention of 1844 with the States of the German Zollverein, providing for commercial reciprocity, expressly conflicted with some existing laws. President Tyler observed that, upon ratification, he would send it to the House for any necessary supporting legislation. The Senate Foreign Relations Committee, through Mr. Choate, recommended against ratification, not on grounds of merit or policy, but on constitutional grounds, for such action, he said,

> would be to sanction so large an innovation upon ancient and uniform practice in respect of the department of government by which duties

[2] 2 Pet. 253.

> on imports shall be imposed. The convention which has been submitted to the Senate changes duties which have been laid by law. It changes them either *ex directo* or by its own vigor, or it engages the faith of the nation and the faith of the legislature through which the nation acts to make the change. . . . In the judgment of the committee, the legislature is the department of the government by which commerce should be regulated and laws of revenue passed.

The resolution of ratification was not passed. In the convention with Great Britain of 1854, Article V expressly reserved its effectiveness until such time as the Parliament and the Congress should have passed the "laws required to carry it into operation." In reciprocity conventions providing for tariff concessions, since the British convention of 1854, the proposed treaty, as negotiated by the President or as amended by the Senate, has made, as a condition of operation, favorable action by the Congress in the exercise of its constitutional power to originate revenue legislation. The Tariff Act of 1913 authorized the President "to negotiate trade agreements with foreign nations wherein mutual concessions are made looking toward freer trade relations and further reciprocal expansion of trade and commerce: *Provided, however,* that said trade agreements before becoming operative shall be submitted to the Congress for ratification or rejection."

From the foregoing instances, it appears that while treaties are generally operative without legislative aid, and while certain subjects within the power of the Congress may be regulated without express Congressional grant or approval, in the case of treaties modifying the revenue laws of the United States, the House of Representatives has demanded legislation repealing prior inconsistent legislation, in keeping with its view of its own peculiar power to originate revenue bills. The Senate, having the power to ratify treaties, has accepted this view, and in some cases has refused ratification, or has amended the treaty so as to respect in full the powers of the Congress. The inclusion of such a clause, either at the instance of the executive or the Senate, has preserved the constitutional right of the Congress, has prevented conflicts between the Congress and the treaty-making power, and has become virtually an admission that treaties involving modifications in our revenue laws need supporting legislation. Where the treaty-making power is extended to cover import duties or tariffs, no cause is furthered by an unnecessary and futile defiance of the Congress in the legitimate exercise of its constitutional authority. On the other hand, full respect for and concession to the Congress in the enjoyment of its revenue powers should not prevent the extension of the treaty power to such tariff matters as are wise and essential, nor should the Congress withhold the necessary legislation to make such treaties operative. Admission of the right should not carry with it the exclusion of international regulation in legitimate forms. Most of our discussion has dealt with treaties entered into by the President and Senate, and with legislation necessary to bring prior enactments into line with treaty provisions.

The United States has dealt with the tariff internationally only in a

superficial and incidental way. Instead of making international regulation a major, or even an important minor concern, we have merely skirted along its fringes, leaving the substance to unilateral action by Congress. As a mode of tariff control, international action has been a sort of Lazarus, thrown some crumbs from the bounteous table of the Dives of municipal regulation. A brief review of some of the examples of such international action will illustrate this tendency.

Much of our international tariff dealings have centered about the "most-favored-nation" clause in treaties. Congress in 1815 exempted by law the vessels of foreign states from discriminating duties in ports of the United States, should like exemption of American ships in the ports of such countries be allowed. Great Britain having allowed the exemption, her vessels in turn became exempt, while French ships were subject to the usual duties. The treaty of 1803 with France provided that ships of France in the ceded territory of Louisiana should be treated on the footing of the most favored nations. The French Minister at Washington protested that French ships in Louisiana ports should be treated on the same basis as the ships of the most favored nation, *i.e.*, Great Britain. Secretary of State Adams in 1817, replied:

> The eighth article of the treaty of cession stipulates that ships of France shall be treated upon the footing of the most-favored nations in the ports of the ceded territory; but it does not say, and cannot be understood to mean, that France should enjoy as a free gift that which is conceded to other nations for a full equivalent. It is obvious that if French vessels should be admitted into the ports of Louisiana upon the payment of the same duties as the vessels of the United States, they would be treated, not upon the footing of the most-favored nation, according to the article in question, but upon a footing more favored than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift, but a purchase at a fair price.

This became the American interpretation of the most-favored-nation clause in treaties, and caused considerable diplomatic discussion with many countries, notably France, Colombia, Austria, Mexico, Great Britain, Japan, Russia, and Germany. The American position was upheld by the Supreme Court in the case of Bartram *v.* Robertson.[3] Certain duties were levied against importations of unrefined sugar and molasses produced on the Island of St. Croix, part of the domain of Denmark. Recovery of the duties was sought on the ground that these goods were entitled to free entry under the treaty of 1826 between the United States and Denmark, under which both agreed not to grant any favor to other nations in matters of commerce and navigation which the other party could not claim and enjoy. The treaty between the United States and Hawaii of 1875 provided that the United States should admit certain articles, including unrefined sugar and molasses, free of duty, in return for certain articles manufactured in the United States being ad-

[3] 122 U. S. 116.

mitted there duty-free. Denmark claimed the privileges enjoyed by Hawaii as regards articles imported into the United States. The Supreme Court held that while the treaty might be self-executing as an exception to the general tariff law, it did not cover concessions like those made to the Hawaiian Islands, for a valuable consideration, and that the provisions under review, while requiring both countries to avoid hostile or discriminatory legislation, were not designed to interfere with special arrangements with other countries "founded upon a concession of special privileges," and that if the mutual exemptions by Hawaii and the United States were regarded as a "special favor" within the meaning of the Danish treaty, Denmark could lay claim to them only upon making like exemptions in behalf of the United States. The court therefore held that the duties could not be recovered by the plaintiff.

This interpretation, which came to be known as the "conditional most-favored-nation treatment," was our official position for many years. The recent history of our reciprocity arrangements, together with altered conditions after the World War, dictated a change in interpretation. Since then, a number of treaties have been negotiated and ratified, embracing our new unconditional most-favored-nation treatment, which has become our new commercial policy in most-favored-nation clause and reciprocity treaty discussions. It implies reciprocity on a basis of absolute equality, and is the negation of special arrangements carrying special privileges. Standing alone, it cannot repair our economic situation, nor can it restore our foreign trade to its normal level. As one of several courses of action in a progressive commercial policy, it can serve a very useful purpose.

The course of the United States in reciprocity engagements may be briefly set forth. In addition to certain reciprocal efforts not clearly indicative of reciprocity as a definite trade policy of the United States, the first experiment was in the form of a treaty in 1844 with the German Zollverein, which, as already set forth, was rejected by the Senate on constitutional grounds. In 1854 a convention was signed with Great Britain, admitting freely into the United States, on a basis of reciprocity, certain products of the British possessions in North America. A reciprocity treaty with Mexico was negotiated in 1859, but was rejected by the Senate. Lack of interest in the movement, and the advances made by protectionism in economic significance and in numbers of adherents caused much distrust of the movement. In 1866 the arrangement with British North America came to an end. The next attempt was with Hawaii in 1875. This treaty provided (1) that the United States, for an equivalent, should admit certain goods from Hawaii free of duty; (2) that various things produced or manufactured in the United States should be admitted into the Hawaiian Islands free of duty; (3) and that the King of Hawaii should not, so long as the treaty was in force, lease or otherwise dispose of any port, harbor, or territory of his dominions, nor make a treaty with another nation granting the same exemption of duties secured to the United States. This treaty was political as well as commercial in character, and

there were special inducements which secured its ratification. The British and German Governments protested against it strongly and repeatedly. In 1903, a treaty of reciprocity became effective between the United States and Cuba, under a promise previously made that when Cuba had achieved her independence, the United States would make certain tariff reductions.

Certain tariff acts were designed to encourage reciprocity arrangements. Section III of the McKinley Tariff of 1890 admitted non-competitive products into the United States, and made possible securing through such concessions certain advantages for American exports in markets where our products competed with exports from other countries. A treaty in keeping with this was negotiated with Brazil in 1891. A number of treaties were attempted, some of which were ratified, and some of which failed. The Wilson Tariff of 1894 discontinued these treaties and the practice of reciprocity, on the ground that it was unfriendly to the Latin American States. In 1897, the Dingley Tariff, a protectionist bill, afforded some opportunity for reciprocity agreements. In countries where the manufactured articles of the United States could find a market, certain concessions were made as regards importation into the United States. However, these imports should not be such as would compete with the home market here. Since such articles were not extensive, the United States agreed to a lower rate on certain named articles, as an inducement to concessions to us. Failing this, duties on these articles were to be imposed. The Senate should, it stipulated, consent to all reciprocity arrangements. The President could, for a period of not more than five years, reduce the duties provided in the act to the extent of 20 per cent. However, such reduction required Senate ratification. This was a good foundation for a reciprocity policy. President McKinley appointed a reciprocity commission to negotiate treaties, with John Kasson as special commissioner. He negotiated a number of treaties under his commission and under the authority of this act, but they failed of ratification by the Senate at about the turn of the century. Little or nothing was done until 1909.

The Act of 1909 repealed the Dingley Act with its reciprocity provisions, and also terminated the reciprocity treaties to which we were then parties, except the one with Cuba. High and low rates were provided for, the high rates to be applied as a penalty against nations found by the Tariff Board to be discriminating against American exports. Thus a reward or penalty was unilaterally applied for or against a country, instead of a negotiated arrangement on the basis of mutual convenience and benefit. A reciprocity treaty with Canada in 1910 was rejected by the Canadian Parliament, and a tariff bill in 1911, providing for reciprocity with Canada, was rendered ineffective through Canadian rejection. The Underwood Tariff of 1913 eliminated the rewards and penalties of the 1909 tariff, and gave the executive authority to negotiate reciprocity treaties which should, of course, be submitted to the Senate for ratification. While professing reciprocity as a mode of restoring and securing foreign trade, no treaty negotiations were concluded under it. The Fordney-

McCumber Bill of 1922, while enthroning protectionism in marked degree, contained certain novel features. Germane to our present discussion is Article 317, introduced as an amendment by Senator Smoot. Retaliatory duties may be levied by the President, where the public interest will be served, but not to exceed fifty per cent. *ad valorem* or its equivalent, upon the products of any country so discriminating against our commerce as to place it on a less advantageous footing than that of any other country. It also proposed the negotiation of commercial treaties on a basis of equality of treatment for all nations. This tariff bill ended reciprocity based on special arrangements between states, and inaugurated the plan of unconditional reciprocity, or unconditional most-favored-nation treatment. The old reciprocity did not seem to be effective. Equality of rates for all nations, and the elimination of special or particular privileges or concessions seemed to pave the way to a new freedom in tariff arrangements, in the international sense. A number of treaties embodying this principle have been negotiated and ratified. However, the high rates of this tariff act neutralized the effect of possible reciprocity arrangements, and weapons against discriminatory practices are provided in the form of so-called "defensive duties." The older concept of reciprocity worked very well during our growing period, when experimentation in policy was possible, and the results not consequential. It hardly seems to fit into the economic scheme of things since the war, and is scarcely an adequate instrument in the necessary process of economic recovery. On the other hand, while unconditional treatment is the policy of the United States, Europe has drifted toward a conditional policy, if she has not reduced her tariff arrangements to the level of a bargaining process. The answer of the United States, it would seem, must be some form of bargaining or concession, through international negotiation.

### III. SHALL TARIFFS BE REGULATED BY MUNICIPAL LAW OR BY INTERNATIONAL AGREEMENT?

We are now prepared to discuss the issue, briefly, between tariff regulation by municipal law, and by international agreement. Attitudes toward this question divide themselves into a few convenient categories.

First, there are those who, through the doctrine of the absolute sovereignty of the state, or the exclusive domestic control of tariffs, would exclude any effective international regulation whatsoever. Their pressure and profession of these doctrines have caused much of modern warfare, both physical and economic. Both are extremes of opinion, and when reduced to their simple legal and economic content, appear unreasonable upon a detached examination, but assume formidable proportions of power and even monopoly when covered by the terms "patriotism" and "protection."

Secondly, a considerable group, closely identified with the first, look upon the tariff as essentially a means of regulating and protecting a home market, but realizing the importance of export problems, and having some concept of economic realities, sponsor and set in motion international arrangements

which will meet the export situation, and the problem of needed imports "on the fringes" of the high tariff and the protected home market. While thorough-going protectionists at bottom, this group has been responsible for much of our effort toward international regulation, moderate and lukewarm as it has been. Relying first upon reciprocity agreements posited on conditional most-favored-nation treatment, these adherents have considerably liberalized their attitude, which has resulted in the relaxation of the reciprocity practice based on special privilege and concession, and has adopted instead unconditional reciprocal relations, an international commercial manifestation of the principle of equal rights for all and special privileges for none. Full credit should be given for this advanced position of freedom and equality in international commercial arrangements. The greatest objection to it lies in its present inadequacy. For one thing, it does not go far enough. International regulation must become a more determining factor in our tariff control. For another, while the United States is seeking to afford foreign countries that unprivileged and equal position it seeks to accord its own citizens before the law, European countries are moving in the direction of inequality, concessions, and conditional treatment. And despite the ideal of equality in both public law for the state and in private law for the individual, and also in matters of commerce, internationally speaking, such ideals can only be approximated, and sooner or later the conditions of special and different treatment manifest themselves. Finally, it is merely a weak antidote to the excesses of unilaterally imposed protectionism, the disastrous effects of which it is deemed to neutralize. So mild a remedy can do little to influence so strong a display of legislative power, motivated by regimented private interests. It should also be said, in justice to this group, that it has looked upon foreign trade, especially in recent years, as an important arm of American business, and has regarded the development of foreign outlets for our exports as a legitimate function of the government, to be pursued in a positive, and even an aggressive manner. So pronounced was this movement, that the representatives of the Department of Commerce abroad became aggressive "trade contact" men, seeking and passing on foreign trade "tips" and "leads" to American exporters. It was an international application of the common view that business goes to those who actively seek it. So convinced of this were our business and government spokesmen, that Assistant Secretary of State W. R. Castle declared in 1928 before a convention of exporters: "Mr. Hoover is your advance agent, and Mr. Kellogg is your attorney." This was a concise statement of the view many people entertained of the functions of our Secretaries of Commerce and of State, respectively! The difficulty with such activity on the part of our government in behalf of the exporting interests lies in the fact that the problem is attacked from the wrong angle. The solicitude of these two great departments was enlisted, and even required, because of the initial handicap imposed on exporting through prohibitive tariff rates legislatively imposed, and through the too moderate means of international regulation which accompanied them. Ex-

perience has proved that the Department of Commerce cannot find markets for our exports, when our customers abroad, although willing, are not in a position to buy; nor can the Department of State afford diplomatic protection to men and businesses virtually devitalized by various forms of domestic "protection." These activities resulted in much movement, but little progress. A tariff drawn so as to grant a monopoly to certain industries in the home market, and through the prevention of imports, to make difficult the exportation of goods usually sold abroad, is so great a handicap to those in the export trade, and those engaged in occupations and professions which form a part of it, that no sales activity, private or public, and no moderate international regulation can overcome it. Relief can come only in two ways: (1) those whose livelihood and happiness depend on products which must be exported abroad must have government aid and encouragement in proportion to their needs and merit, and must have the same solicitude, though manifested in a different way, enjoyed by the "protected interests"; and (2) import restrictions must yield sufficiently to make possible purchases abroad through reasonable foreign sales here. We have persisted long enough in the fiction that our municipal legislative power must be exercised in the interest of one group of producers alone, even to the devitalization of the trade of another. The greatest hope in reasonable international regulation, and in a sound municipal control, lies in the possible acceptance by this group of thinkers that the exporter and allied interests are entitled to a legitimate place in an integrated and balanced national economy, and that both municipal and international regulation must be shaped with their interests in mind. Having made important gestures in this direction, it is possible that the realities of the situation may induce them to go even further, and through rational compromise of two opposite, but easily reconcilable interests and concepts, reach a common-sense and financially profitable adjustment of the problem.

The third group may be said to be composed of those who hold to the view that tariff matters are essentially, if not exclusively, international rather than domestic in function and consequences, and should accordingly be international in control. Such a position appears to many as sound in theory, and is embraced by a considerable number of intellectuals, and a goodly but not a controlling number of business and financial men. Such men have, it may be said, thought through the tariff problem to what they regard as a logical and ideal solution. As a counsel of perfection such positions are valuable, and operate as a deterrent to the professions and practices of the extreme protectionists. Their views may be entertained and advanced with as much reason as those of the protectionists, and the fact that they emanate from the university campuses rather than from the marts of domestic trade does not negate their soundness or importance. They are, if anything, more carefully thought out, and more detached, without the impulsion of a controlling economic motive. Adjustments and solutions, however, must be possible rather than ideal ones, and workable rather than logical. Those who seek genuine relief

for American export interests and an enlargement of our disappearing foreign trade must face two facts. One is that a measure of protectionism, and an appreciable measure at that, will be afforded industries in the United States which depend essentially on a home market. It will not be abandoned. Another is that the unilateral control of tariffs through municipal law will remain as the initial, and doubtless the apparently major form of tariff regulation. Free trade, allowing an indiscriminate flow of imports into the country will not displace protection, nor will legislative regulation be abandoned for one or several forms of international regulation. We must start with the assumption that duties will be initially imposed by domestic law, sufficiently protective in some cases to afford a legitimate home market, and sufficiently low in others to allow importations as a stimulation to export trade. International regulation would follow as a means of affording concessions to such countries, as regards commodities not jeopardizing our domestic economy, and would extend favorable treatment to our articles of export. We must end the deadlock. The tariff laws must cease to be viewed as a weapon in the hands of our domestic producers to annihilate our foreign trade. Our commercial treaties must not become instruments in the hands of exporters to ruin the economic position of the domestic producer. The legitimate claims of each must be studied, examined, and determined, and the municipal and international measures of control adjusted and integrated so as to complement and supplement each other, rather than to defeat and devitalize each other. It is better that both should have a measure of recognition and should realize a reasonable share of their aims than that one should win and the other suffer defeat. An irreconcilable position in favor of free trade and international regulation, and against all protectionism and municipal control may appeal as logical and sound theoretically. It will not, however, in this doctrinaire form, restore our export trade. A *rapprochement* with indoctrinated, intrenched domestic producing interests is necessary.

It is possible that a fourth group, whose common ground is the necessary compromises and adjustments which the second and third groups could reasonably and consistently make, is evolving in American society. Indeed, the nucleus of it is already here. The impact of the world economic situation and the logic of events have detached many from their former moorings of doctrine and practice, and they seek, in increasing degree, to adjust their thinking and conduct in keeping with the demonstrated realities of the world in which we now live. An economic realism seems to be here, which recognizes that general principles and pet doctrines do not decide concrete cases, and which refuses to confuse and defeat recovery through a division into the political extremes of nationalism and internationalism, and the economic extremes of protectionism and unlimited foreign competition. The protected producer is realizing that it is more economically sound that, through a reasonable concession on his part, those who depend on the export of cotton, machinery, petroleum, automobiles, fruits and nuts, chemicals, packing-house products, wheat, iron and

steel mill products, and other commodities, shall have an opportunity for economic betterment, than that they should, through the loss of an export market, become a public charge, which he, the protected producer, will have to support. The exporter on his part should not forget (although he has never had the opportunity to forget) that the United States is something of a customs union, and that certain positive benefits flow from this fact. Our international trade cannot bring about too radical a dislocation of our internal trade, which, from the nature of the case, must be locally produced, nationally marketed, and nationally consumed. Moreover, the labels and slogans of the past seem to be yielding to the sane approach of realism. The fourth group of which I speak will not be "tagged" in its thinking or in its practice, but will deal with concrete situations, and through experimentation, will arrive at a practice based on present-day forces and modern needs. It will also take account of those forces in other governments which must inevitably affect, adversely or favorably, the foreign trade of the United States. It will also seek to meet measures of foreign control as they are, and not merely as one or more groups think they are, or ought to be. And it will take account of the fact that protectionism plus unconditional reciprocity has not maintained prosperity in a home market, and may even have contributed in part to the loss of our foreign trade. It will recognize that the tariff in all of its implications is one of the most complicated functions of government, which must be dealt with on all fronts, inch by inch, here a little and there a little. And to complete the picture, it must be taken out of politics.

A word should be said in refutation of the position of those who affirm that the tariff is solely a matter of domestic concern, and exclusively within the domestic jurisdiction of the individual countries of the world. International law does, of course, recognize it as a matter of domestic jurisdiction, and the Constitution unmistakably confers the initial power of tariff control on the Congress. Belonging to the fraternity of teachers of international law, I, along with others, set forth the theories of absolute sovereignty and exclusive jurisdiction, followed by a discussion of the conduct of nations, involving notable exceptions to these doctrines, to the point where, in many cases, the exceptions have become the rule. Having given some study to the Constitution in its manifold aspects, I realize that the Congress insists upon a recognition of and a respect for its constitutional powers.[4] However, it is also true that some of them have been the subject of international regulation, with the acquiescence, if not with the express consent, of the Congress. The economic nationalist or isolationist can take scant comfort in international and constitutional forms and theories, when the substance and the practice are otherwise. International fact is the most potent force in the international life of the state. It recognizes that the tariff is one of the subjects of state concern least susceptible of exclusively domestic treatment. The fact that numerous treaties

[4] See Martin, C. E., An Introduction to the Study of the American Constitution (New York, Oxford University Press).

have dealt with tariff problems, in a direct or indirect way, is abundant proof that this is so. Perhaps the most significant statement of those who would limit or exclude international regulation is that made by the Secretary of the Treasury, Ogden Mills, in 1932, who affirmed that "the rates in our tariff laws are a purely domestic question to be determined by the Congress of the United States without consultation with foreign governments." As a matter of abstract legal right, Mr. Mills may be said to be correct. As a matter of international fact and economic reality, it reveals an astounding misunderstanding of the actual situation hardly to the credit of Mr. Mills. Tariff rates which strike at the heart of other countries, and always, of course, unilaterally imposed, result in arrangements adverse to our interests, and in some cases frank and open retaliation. The interests and views of foreign governments may not be consulted, may be ignored, or even directly invaded. We cannot wisely pass over the fact that the regulation of international commerce is not exclusively a unilateral undertaking. National manifestations of domestic policy have profound national responses and reactions elsewhere, followed by unfortunate economic consequences. It was the unreasonable display of domestic power over immigration that unnecessarily and unjustly offended a great nation,[5] when a moderate and equal exercise of that power, or international regulation, would have prevented the affront, satisfied the demands of a proud and progressive people, and would, at the same time legitimately have safeguarded the interests of the United States. It is the unreasonable exercise of domestic control over aliens which leads to international friction and to discrimination abroad, when moderate legislation or international regulation would serve the interests and the needs of all. Likewise, in tariff matters, a studied and purposed disregard of the interest of the states with which we must trade, results in friction and retaliation, which considerate legislation, or international regulation, would prevent, without appreciable sacrifices as regards American interests. Here, as elsewhere, the absolutist leads us straight to the desert. An uncompromising legal position, coupled with an unreasonable profit motive, has usually brought about trade discrimination against us, and severe losses in foreign trade. Such a view, translated into practice, is the negation of international regulation, and the death of international trade.

### IV. WHAT MODE OF INTERNATIONAL REGULATION SHOULD BE FOLLOWED?

If we have established that, in the present juncture of world affairs, including our own, international regulation is a helpful mode of control, we are faced with the equally important question, What mode of international regulation must be followed? Of the several forms, which is the one which may now be applied? The answer leads to a few observations:

1. International regulation through multilateral treaties of universal or world-wide application, negotiated at general or world economic conferences,

[5] The exclusion feature of the Immigration Act of 1924.

offers little prospect of effectiveness for some time to come. The World Economic Conference of 1927, seeking to reconcile the conflicting economic policies of states, recommended that trade barriers be eliminated as much as possible. This involved the lowering of high customs duties and the removal of import and export prohibitions. The high purpose of international economic peace and freedom was not realized. States seemed, following the conference, to move more directly toward nationalism and high tariffs. The League of Nations, through conferences and conventions, did not afford the necessary economic relief. Nation against nation, region against region, erected barriers and prohibitions, clearly within their sovereign and legislative power, but manifestly in violation of the spirit and purpose of the 1927 Conference.

The World Economic Conference at London in 1933 seemed to promise a way of escape from trade barriers and conflicting national economic policies. On June 17, 1933, the American delegation submitted a memorandum of tariffs to the economic commission of the conference, suggesting the reduction of tariffs by multilateral agreements; a ten per cent. horizontal reduction in import duties; the extension of the customs holiday; regulating license and quota systems of control; and the encouragement of bilateral arrangements between states on the basis of unconditional and unrestricted most-favored-nation treatment. These points represented, in the main, the position of Secretary Hull, who repeatedly called upon the conference to abandon a system which implied the necessity of the cutting of acreage in agriculture, and the curtailment of production in industry. Senator Pittman denied that the ten per cent. reduction plan was the attitude of the entire American delegation. Unfortunately, the delegation was divided into two groups: one leaning toward a national economic settlement of our recovery problems; and one toward a program of international coöperation. The President, for the time being, seemed to settle the matter by deciding in favor of the primacy and the superiority of the so-called national plan. The conference was wrecked through the insistence of the Gold Bloc countries that the stabilization of currencies must go hand in hand with customs reform, and through the insistence of Mr. Roosevelt that American stabilization was a part of the domestic recovery plan of the government, which could not be modified or influenced by the demands of other Powers. He declared that "the sound internal economic system of a nation is a greater factor in its well-being than the price of its currency in changing terms of the currencies of other nations." Such a position seemed to some an embrace of economic nationalism. His recent statement on the tariff question reveals that he, at the time, regarded our domestic economy as first in line for repair; and that, with internal measures of recovery well under way, the time is at hand to seek the recovery of international trade through international action. It must be observed that the occasion for the failure—the position of Mr. Roosevelt and the reaction of the Gold Bloc—was not the underlying cause. The other nations did not seem to desire any effective or

genuine reduction on a general or universal scale. The failure of the conferences teaches us that, for some time to come, the reduction of tariffs by multilateral treaties on a universal or world-wide scale will not materialize. It also shows that general, world-wide conferences are too unwieldy, and the interests of the parties too diverse and complicated to promise any success. The problem must be attacked through smaller groups of nations, whose relations are sufficiently significant to justify and even to compel agreement.

2. International regulation through multilateral treaties, negotiated by a manageable number of states located in a definite region of the world, and arrived at through a regional conference of such states, offers a much better prospect of results. Progress in this form, however, has been too slight to be of appreciable or significant instruction to us in our present situation. Such conferences and treaties would, doubtless, mean the beginning of the functional and territorial decentralization of international organization. The League and the conferences on a world basis are too large; and are too frequently preoccupied with political questions. It might lead in time to customs unions, and might conceivably mean continental as against our present national competition. The United States is already something of a customs union, where the political principle of federalism, extending the country's sway over a large, self-sufficing area, has made, under the policy of protection, a large and frequently sufficient market. Protection, to work well at all, obtains where political boundaries have been enlarged to encompass an economic and geographic unit which makes possible the production of a diversity of commodities, which may move freely within its borders, without a tariff handicap. The Briand proposal of a "United States for Europe" implied the idea of free trade for Europe, with a common tariff, and the free and uninterrupted movement of goods from the point of production, through various national territories, if necessary, to the point of consumption, without unreasonable delays or formalities. Moreover, a market of continental proportions would be provided for European goods. Japan, with her increasing political influence in the East, put on an economic basis, might well suggest a common customs territory for that area, as against the usual bilateral arrangements. This danger of making the regional conference into a customs union may not be serious, but it suggests important possibilities. It offers the opportunity of multilateral tariff reduction, but at the same time sets region against region, as nation today is set off against nation. The example has been set by our own virtual customs union of 48 states, territories, and dependencies.

In sharp contrast with the World Economic Conference, the Seventh International Conference of American States, held at Montevideo, illustrates what a conference of a definite, contiguous region can accomplish in the international economic field. The conference was content, in the main, to pass resolutions of general policy, and to recommend special conferences on commercial matters, rather than to negotiate a general customs treaty for the two Americas. The economic proposals made by the American delegation were

known as the Hull Plan. They seek the economic restoration of this hemisphere through the restoration of normal international trade. They seek to protect the restoration of normal international trade. They seek to protect the commerce of the area by legislation of a national character and through treaty guaranties, as an offset to the present loss of international commerce. The resolutions offered by Mr. Hull commit the countries to the view that world trade obstructions impede national as well as general world recovery; that they seek to abandon economic conflict and to attain a measure of economic disarmament; that a mutually profitable exchange of goods would have favorable economic effects; and that the reduction of high tariff barriers can be effected only by simultaneous action on the part of the nations.

3. There remain bilateral agreements between interested nations, whose economic relations are sufficiently close to justify agreement and adjustment, as the final means of international regulation. It is the simplest and the oldest form of international tariff control. We have seen that the two general economic conferences failed, but for different reasons. Moreover, an examination of regional conferences and agreements discloses an improvement over the world conference and the universal treaty, as regards concrete results. Even so, it is not an adequate means of dealing with our present emergency. The basic form of such regulation, then, seems to be the bilateral treaty, for larger conferences and more inclusive treaties tend only to pave the way to negotiations between two states, resulting in the bilateral arrangement. Thus, the international regulation of tariffs becomes effectively decentralized.

### V. REGULATION BY TREATIES MADE BY THE PRESIDENT WITH THE ADVICE AND CONSENT OF THE SENATE, OR REGULATION BY EXECUTIVE AGREEMENT UNDER THE AUTHORITY OF AN ACT OF CONGRESS

The President of the United States, through his message to Congress, under date of March 2, 1934, and the Secretary of State in his statement before the House Ways and Means Committee on March 8, 1934, have asked for fundamental changes in tariff policy and procedure. For one thing, unconditional most-favored-nation treatment, while not a new policy, becomes virtually that through positive affirmation of it by the government as the basis of its commercial policy, aggressively pursued. For another thing, instead of attempting to negotiate formal treaties requiring Senate approval, the President seeks power, under Congressional authority, to negotiate executive agreements instead of treaties, which may be put into effect without the delays which attend formal treaties or municipal legislation attempting to deal with the details of tariff procedure. It is not a case of using the treaty-making power to do something which might have to be reconciled with existing legislation. It is the executive asking the Congress to make use of its power of revenue legislation to authorize in general terms the negotiation of executive trade agreements with foreign governments, with no thought of Senate ap-

proval. The executive would be responsible to the Congress, under its own revenue enactment, and would be a form of international tariff regulation, but as authorized by municipal law.

The President and the Secretary of State have asked that, "as a part of the emergency program necessitated by the economic crisis through which we are passing," legislation providing for trade agreements negotiated by the executive, be enacted, terminable within a period not to exceed three years. A shorter period would be ineffective. The Secretary of State, before the House Ways and Means Committee, indicated that all but two of the continental European countries, England and her dominions, and some Latin American countries, had vested some such authority in the executive, and indicated the different practices. In some cases the agreements are effective immediately without parliamentary approval; while in others they are put into operation provisionally, awaiting legislative action, which for the most part is perfunctory. The remaining question is the form it shall take in the United States, which is suggested in the proposed legislation.

Doubtless there is much agreement on the need for and the effectiveness of the plan as proposed by the President. There is also some dissent. However, there is greater disagreement on the regularity and the constitutionality of the procedure. It is claimed that such a step will be a delegation of the Congressional power to tax and to raise revenues, which the Congress should not, as a matter of policy, and cannot as a matter of law, take. These executive agreements are regarded as treaties, in legal effect, which the Senate cannot afford to allow to stand, without its consent. Also, it is a concession of the unfitness or inability of the Congress to perform its major constitutional functions.

There is some precedent for what the President has requested, but not in the precise form. By Section 3 of the Tariff Act of 1890 (the McKinley Act), it was provided that whenever the President should be satisfied that any government exporting to us certain mentioned commodities coming in free of duty, imposed duties on certain American commodities which were, in the light of the free introduction of their own goods, unequal and unreasonable, the President could by proclamation suspend their free admission into the United States. Several agreements were concluded and proclaimed under this section. The Supreme Court upheld this section in the case of Field *v.* Clark,[6] and declared:

> . . . while Congress could not delegate legislative power to the President, this act did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was merely in execution of the act of Congress. It was not the making of the law. He was the mere agent of the law-

[6] 143 U. S. 649.

making department to ascertain and declare the event upon which its expressed will was to take effect.

By Section 3 of the Tariff Act of 1897, the President was authorized to conclude reciprocal agreements within certain limits, and to put them into force by proclamation. By Section 4 of the same act, certain other arrangements would require the advice and consent of the Senate. Ten commercial arrangements, called the "Kasson" treaties, were negotiated under this (Dingley) Tariff Act. However, they met their Waterloo in the Senate.

The powers vested in the President under Section 315 of the Tariff Act of 1922, and the constitutional controversy over it, offer some light on the present so-called delegation of legislative powers to the President. The assessment of duties under Presidential proclamation, pursuant to Section 315, was strongly protested. It was asserted that Section 315 was "unconstitutional and void by reason of the fact that therein and thereby the Congress of the United States had endeavored to delegate to the President of the United States the constitutional power to lay and collect a tax contrary to the terms and provisions of Article VIII, Section 1, Subdivision 1, of the Constitution of the United States." The constitutionality of this section was upheld by the Supreme Court of the United States in the case of J. W. Hampton, Jr., & Co., petitioner *v.* United States.[7] The President had raised the duty on barium dioxide from four to six cents a pound. The United States Customs Court and the United States Court of Customs Appeals both held the section constitutional. Petition for a writ of certiorari was granted, and the Supreme Court reviewed the case. Chief Justice Taft declared that, due to the difficulty in determining the difference between costs of production here and abroad, Congress had determined upon its policy and plan for doing so, and had conferred the function on the President, with the assistance of a body of investigators, the Tariff Commission. The Congress must sometimes use executive officers to secure the exact effect intended by its legislative acts, through vesting in them discretionary authority to make regulations interpreting a statute and arranging for its execution. He concluded: "Congress may feel itself unable conveniently to determine exactly when its exercise of legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive. . . ."

Only the courts can determine with finality whether a given employment of the executive by the Congress to interpret and apply some of its legislation is constitutional. However, we may with safety indicate the tendency in the United States to make larger use of the executive in attending to the details of the execution of legislation, the Congress expressing its will and purpose more and more in general terms. Such use of the executive is, abroad, common and general. The habit of the Congress to concern itself with the details of legislation has not been altogether fortunate, and has had some bad results.

[7] 276 U. S. 374.

With the emergency in which we live, and with rapidly moving events, legislation is too slow to deal with some situations. Action rather than deliberation is required. With the advantages of unity, stability, independence, and definite tenure, as secured by our presidential form of government, we are in a better position to benefit by such arrangements than any other government in the world. However, we have been the most reluctant to make use of them. This conservatism has been due to our much overworked doctrine of the separation of powers, and to the jealousy of the Congress as to its constitutional prerogatives. It has also been due in part to the desire of politicians to tinker with the tariff bills. By not employing them, we have allowed other countries with less stable governments, but even more trusting of their executive, to reap the rewards of prompt and decisive action. If we have at last reached the time when this course can be taken, frankly and aggressively, we shall have greatly facilitated the administration of our domestic affairs, and shall have relieved our legislative bodies of unnecessary congestion. They will have more time for the enactment of laws embodying general policies. In the field of the international regulation of tariffs, a new day will have come which will restore the confidence of nations, will simplify our complicated tariff procedure, and will mean untold economic benefit for much of mankind, and for all the people of the United States.

The PRESIDENT. I am sure we must be especially grateful to Professor Martin for having extended international law to tariffs, which are essentially international in their nature. The discussion is now open, and will be led by Professor Deák, of Columbia Law School.

Professor FRANCIS DEÁK. Mr. President, members and guests of the Society: It was with some hesitation and trepidation that I accepted Dr. Wright's kind invitation to open the discussion on such a highly controversial subject as the international regulation of tariffs. Last summer, as a delegate to the Monetary and Economic Conference held in London, I had the privilege —or, perhaps, I should say, the misfortune—of taking part in the deliberations of the Committee on Commercial Policy. I must say frankly that I was dumbfounded by the perplexity of the questions which were discussed there in connection with tariffs—questions which the conference was, as you know, unable to solve.

As I see it, the fundamental problem raised by Professor Martin's very able and clear paper may be broadly stated as follows: Should the regulation of tariffs be a matter of international concern, or should it be regarded as a matter exclusively within the "domestic jurisdiction" of every nation? The answer to the question seems to me to be clear: This problem must be subject to international regulation. I hope very much that it will be—soon!

I believe that at London everyone realized from the very outset that tariff regulation must be subject to international action in one form or another. It is of course discouraging that the London Conference failed, in spite of this realization, to accomplish anything in this respect. One of the reasons for

that failure was a too great insistence on the part of the representatives of the various nations that this international regulation should in no way impair selfish national interests.

The reason why municipal regulation cannot successfully deal with tariffs is the fact—frequently disregarded or not sufficiently appreciated—that tariffs are only one aspect of a general problem which is obviously international in all its implications. This problem is international trade, and the tariff is *one* of the devices whereby this trade is guided and regulated. There are other devices, equally important, such as, for instance, monetary policy; and, unfortunately, these devices are mutually interrelated. You cannot deal with one aspect of the problem in utter disregard of the other aspect. In 1924, an attempt was made to set up an international monetary system without paying any attention to settling, at the same time, other aspects of the problem, so that the regulated flow of money and credit from one country to another should be accompanied by a regulated flow of goods and services from one country to another. I do not need to remind you how dismally that attempt failed. The same fate would have awaited any attempt to regulate tariffs without a simultaneous regulation of monetary questions. Therefore, I do not deplore the failure of the London Conference to adopt a general ten per cent. reduction of *ad valorem* duties.

In suggesting that tariff regulation is a matter of international concern, I do not mean to imply that the regulation must, of necessity, be brought about by a general convention to which all nations or a great number of nations must be parties. Professor Martin's suggestion is that by concluding bilateral agreements we can take one step toward the international regulation of tariffs and break down gradually the present *impasse*. I am not sure that I can agree with his proposal without some qualification. It seems to me that much depends on the question, which nations are parties to such a bilateral agreement. A bilateral agreement between the United States and Great Britain, or between France and Germany, may have a very significant effect. I doubt if a bilateral treaty between the United States and Latvia, or between Greece and Peru, would contribute much toward breaking down tariff barriers.

Between a general convention and bilateral treaties there is a middle way in the form of regional agreements between neighboring nations which constitute an economic unit. As you know, this method has been adopted and seems to accomplish modest results in Southeastern Europe. You have there the economic coöperation between the members of the Little Entente; more recently a regional understanding has been arrived at between Italy, Austria and Hungary.

There is one more point which I want to bring before you. International lawyers have paid very little attention in the past to the question of tariffs. I feel that this Society should be congratulated in taking up first, so far as I know, among all similar organizations the question of international regulation of tariffs. Being pioneers in the field, we may expect the hardships which

pioneers always encounter. We will find a great many difficulties in dealing with this problem. But that should not preclude us from examining and studying the question.

In conclusion, Mr. Chairman, I submit that the ensuing discussion should be guided by the consideration of the following questions: First, whether or not the regulation of tariffs should be a matter of international concern. Second, if the answer is in the affirmative, what is the best device to accomplish the end, *i.e.*, bilateral treaties, regional agreements, or a general international convention?

The PRESIDENT. The question is now open for general discussion.

Mr. BENJAMIN AKZIN. We are all anxious to include in our deliberations every question intimately connected with international law. Still, we cannot well extend international law so as to cover every problem affecting international society. This problem of international tariffs, I am afraid, lies beyond our proper field of vision and cannot be usefully discussed from the point of view of international law.

Our President said that he is very grateful to Professor Martin for having brought a problem of international relations into this meeting. It is undoubtedly true that the question of international tariffs is one of international relations, but international relations is merely a general term covering many problems of widely differing nature, and not all of them have a specific interest from the point of view of international law. The problem of tariffs is essentially one of economics. Whether a state should try to be economically self-sufficient and consequently raise tariffs, or whether it should try to base its economic structure on an unfettered interchange of goods and consequently lower tariffs, is a most important question, but no international lawyer will find any indication in international law on the basis of which he could recommend the first or the second of these solutions. This is a question which we should better leave to economists and to specialists in national and international trade.

I wonder whether it would be possible to arrive at a uniform conclusion from a purely economic point of view. You need but compare the widely differing cases of Great Britain and the United States. In Great Britain the relative importance of the foreign trade within the total trade balance and economic structure of the country is much higher than in the United States. The policy to be adopted with respect to international tariffs may consequently be reasonably different from case to case and from market to market. Still, even if economists may be able to formulate a uniform policy to be followed, international lawyers, operating with the specific means of international law, will never be able to accomplish this.

Where does international law come in, in this whole problem? It simply comes in by putting at the disposal of statesmen and of economists the procedural machinery developed in international law, in order to regulate tariff relations, if the states want to make use of this machinery. This machinery,

the ordinary procedure of diplomatic negotiations, of conferences and of treaty-making, is already in existence, and I do not see that any modifications are necessary in order to apply it to tariff regulation, if the states so desire.

I should like to come back, in this connection, to the question raised by Professor Martin and by Professor Deák. Both seem to believe that there is no doubt as to the preference of tariff regulation by international action compared to regulation by unilateral municipal action. Maybe this is true and maybe not. I do not think we would be justified in deciding such a point. No doubt, regulation of tariffs by unilateral action on the part of one state carries its economic penalty. The penalty is the probability that third states will also take unilateral action. But it is conceivable that a state is fully prepared to meet this penalty, because it values the development of the inland production more than the free interchange of goods. Whether this is a sound economic doctrine or not is another question, but this has nothing to do with international law.

It is true that international tariffs should interest us inasmuch as they represent a possible source of international conflicts and may even lead to war. From this point of view, we may legitimately encourage the provision of some machinery of conciliation which should permit the solution of tariff conflicts on the basis of international coöperation. But it does not appear that the problem would be essentially different in this case from all other cases of a conflict of interests.

There is one concrete question that was asked by Professor Deák and that might be answered in the discussion. The question was as to which of the two existing methods of international tariff regulation is more practical in the prevailing conditions, bilateral agreements or multilateral ones? The practice shows the inability to cope with the problem of tariffs by collective treaties. I do not think that the London Economic Conference was less well prepared than other international conferences. As a matter of fact, it was preceded by a much more elaborate preparation than most post-war conferences. However, its failure has been complete, and in no field was this failure more complete than in that of tariffs. After the remarks made last night by Professor Fenwick, I need not mention the Conference of Montevideo. The significant instance, however, is that of the Imperial Conference of Ottawa. Maybe this is already beyond the border of international law. But here we have a community of nations so closely bound to each other that other states, forming the community of nations in international law, may only dream of attaining this stage some day. But even there, when it came to regulating tariffs, the general agreement had to give place to a series of bilateral agreements.

The most promising procedural development in international law of recent times is the substitution of collective agreements and regulations for purely bilateral acts. In the matter of tariff regulation, economic realities seem still to be in the way of adopting this procedure. All that international

law offers of practical value in the matter of tariffs, is the ordinary procedure of bilateral agreements. If states want to make use of this procedure, they are welcome to use it. I doubt whether we may, in our capacity of international lawyers, go much farther and advocate any substantial tariff policies.

The PRESIDENT. I hold in my hand a document which has just reached me, from which it appears that hearings are today being had by the Senate Finance Committee on the reciprocal trade agreements bill, which is precisely the question now under discussion in the American Society of International Law. Is there any further discussion?

Dr. NICHOLAS J. SPYKMAN. I simply want to ask permission to address two questions to Mr. Martin and one to the last speaker. The first question deals with the use of language, the second with a problem in logic, and the third with economics.

The first question which is addressed to Mr. Martin is as follows: Did I understand correctly that he considered the change from tariff-making by legislative procedure to tariff-making by the executive was a change which removed the process from politics? We have a tendency to use the word "politics" for the kind of political procedure which we do not like, and call nonpolitical the procedure we do like. It strikes me as an incorrect use of words to say that by handing the tariff-making over to the executive we have removed it from politics.

My second question is a question of logic. I understood Professor Martin to say that reciprocal trade agreements are instruments designed to realize our present policy which favors an unconditional most-favored-nation treatment. Reciprocal treatment and unconditional most-favored-nation treatment seem to me contradictory terms. If unconditional most-favored-nation treatment is what we are after, the continuation of uniform flat tariff rates would seem to me the simplest method toward that end.

The third question is addressed to the last speaker. I heard him, with almost dogmatic intonation in his voice, lay down the proposition that the decision as to whether a state would enter into a specific trade agreement was solely based on a judgment of economic advantage. I submit that the history of the economic relations among states since 1850 clearly disproves this proposition. In innumerable cases commercial policy, particularly in regard to tariff-making, has been determined not with reference to economic benefit, but with reference to strategic considerations. The whole concept of strategic raw material and key industries indicates a military, and not fundamentally an economic, motivation.

Mr. AKZIN. May I simply submit that the questions are obviously questions of economics.

Professor MARTIN. The first question is whether or not the shifting of tariff control from the legislative branch to the executive is removing it from politics. I made no such statement. In the economic part of my discussion, I said that it *should* be removed from politics. I did not state that such a

move would take it out of politics. I think such action would tend to reduce it as an instrument of politics.

In the second place, on the question of logic, as to whether unconditional most-favored-nation treatment, if continued, would not be the same thing now asked for. As a matter of general policy, that is true; but the difference is merely one of form; it may be the difference between tweedle-dum and tweedle-dee, but the celerity and dispatch of the executive agreement is new. It is a matter of bargaining. Chesterton said that logic drives men mad. The treatment might be so logical that we would never get anywhere.

Professor FENWICK. The problem is this: In 1923 we entered upon a series of unconditional most-favored-nation treaties, and it now appears that the new bilateral treaties fundamentally conflict with the earlier treaties. The moment you make a special bargain, you cannot do the same for others. England swaps coal with Denmark for so much of Denmark's butter. If England agrees to take 60 per cent. of her butter from Denmark, she cannot make an agreement of that kind with anybody else. It is not the kind of agreement that can be translated into the form of an unconditional most-favored-nation treaty. I feel that the bilateral form of treaty is fundamentally contrary to the State Department's recent policy, although new conditions may call for the change.

Professor MARTIN. I will say that I have discussed this problem with a member of the Tariff Commission, and we both agreed that there was a conflict. However, I do not know the view of the Department of State. I look upon the executive agreement as a temporary expedient during the present emergency; and I think that I am more in favor, in the long run, of treaties providing for unconditional most-favored-nation treatment.

Professor DONALD C. BLAISDELL. I would merely like to ask an additional question in reference to the incident that Professor Fenwick has referred to; that is, the instance of the sale of British coal to Denmark for Danish butter, as an example of possible conflict between the principle of unconditional most-favored-nation treatment and the principle of reciprocity through bilateral executive agreements. Is it not true that if Denmark is the principal source of butter imported by Britain, and if Great Britain is the principal source of coal imported into Denmark, that these two commodities can be made the subject of a bilateral agreement between the two countries concerned, and at the same time the concessions made by each to the other can be extended to third parties through the operation of the unconditional most-favored-nation clause, without doing damage to the principle, nor jeopardizing the prospect of increased trade in these commodities between the two countries?

If the United States receives the greatest portion of its raw silk imports from Japan, and Japan receives the greatest portion of its raw cotton imports from the United States, and no other single country sends to the United States anywhere near the amount of raw silk that Japan does, and no other single

country sends to Japan the amount of cotton the United States does, cotton and silk could very well be made the basis of a bilateral agreement between Japan and the United States, and any concessions made (assuming the existence of import duties on the two commodities) could be extended to all other nations through the operation of the most-favored-nation clause, and your objective can still be realized. Let the other countries who can compete with Japan in the raising of raw silk enjoy the treatment that Japan will receive through a bilateral agreement, but Japan is still going to be able to export to the United States the bulk of its raw silk, and the same applies to raw cotton exports from the United States to Japan.

I believe this general question of a possible conflict between the two fundamental ideas as matters of policy has been taken up in a very illuminating and very thorough article by Mr. Benjamin B. Wallace, in *Foreign Affairs*, where he analyzes, step by step, the procedure which presumably the State Department will carry out if the pending bill is passed by Congress and the executive receives the right to enter into these executive trade agreements. There he shows, quite conclusively, I believe, that fundamentally there is no conflict between the two principles.

Professor DEÁK. Mr. Chairman, I think there was a plea to the jurisdiction of this court by one of the speakers on the ground that this is a question of economics and not of international law. I do not see at all, and I refuse to concede, that law and economics are mutually exclusive. If the contention of this gentleman is correct, then I suggest that the members of the Bar are not competent to deal with the whole body of the law which we have built up under the Sherman Anti-Trust Law or the N.R.A. I do not believe that international law deals only with diplomatic immunities and jurisdiction over consuls. I feel strongly that it is time to take a broader point of view concerning the sphere of international law.

The PRESIDENT. Is there a desire to continue the discussion? I notice that Mr. Coudert has honored us with his presence, and he has never failed to enlighten us on any subject in which he has participated.

Mr. FREDERIC R. COUDERT. All that I can do is to exhibit my ignorance. I have been a friend of the President for ever so many years, and he seldom fails to offer me an opportunity to do so. There are many men here who have given a profound study to this question, who can discuss it much more fruitfully than I. All I have in the matter are principles which other people might call prejudices. I am against the present system of protective tariffs because I think they make for war and trouble.

Professor PHILIP MARSHALL BROWN. I remember once in the Senate that when one of the Senators said it was perfectly obvious that a certain thing was true, Senator Root interjected, requesting the Senator to make clear what was so very obvious. Mr. Deák has assumed that this matter of tariff-making is very properly a question for international agreement. I must confess that it is not so obvious to me. It seems to me that the principle of interna-

tional tariff-making runs counter to the very basis of international law; that international law rests upon the consent of individual nations; it is not imposed; that international law considers interests; that the interests have to be acknowledged and recognized by the respective nations, and that in so far as these nations do recognize these interests, we can build up gradually and slowly a body of international law. But it seems to me we must come back to the question of the recognition by each nation of the interests involved. Certainly, we must recognize this matter of the economic interests of the state is one of pressing international concern. Furthermore, it seems to me that the proposition of Professor Deák is not so obvious at all, particularly, in the light of this very London Conference to which he referred and in which he participated. There it was demonstrated conclusively that the nations of the world were not prepared to enter into any international treaty or agreement settling these exceedingly difficult questions of national interest. But they did lay down a very sound principle which coincides with the very basis of international law. They laid down the principle that before you can have an international agreement each nation must set its own house in order. National recovery is the key to international recovery. International society is struggling hard to carry along several unfortunate nations known as backward nations, economically and otherwise.

I am not one of those who decry nationalism; I recognize it as an inevitable fact. The very basis of internationalism is that we ought to recognize and respect the rights of each in turn. If a nation has been reluctantly granted certain rights, we ought to be patient until that nation establishes itself as some of the more advanced nations. Furthermore, I do not see that there is anything inherently vicious or bad in the idea of national tariff-making. Let us consider this from the practical point of view. I belong to a profession which my friend, Mr. Coudert, considers to deal mainly with the abstract. He often observes that "We lawyers regard these things in a different manner." May I put myself in the place of the lawyer and not the professor in considering actual conditions?

I was in Bulgaria last autumn and stayed there long enough to sense something of the situation. Bulgaria is economically so impoverished that there seems nothing to do except to prevent money flowing out of the country. They are desperately holding on to their currency. The only way in which to do that was to prevent their citizens from spending abroad. Bulgaria is building up a whole series of industries that did not exist before. Bulgaria is getting busy with the things which it perhaps should have done before, and it is doing it under the protection of tariffs. Take another instance when a nation like Russia goes into business, where you have a government in business and where you can have all of the enormous resources of the country and all of the administrative machinery applied to the practical question of business; where citizens in one way or another may be compelled to give their labor to the state; where lumber may be cut by conscripted labor and shipped to this

country, to the ruin of some of our industries. Such situations must be met. They cannot be met by the application of general theories; each nation has to meet these emergencies. May I suggest the way out, the one indicated by Mr. Akzin, with which I thoroughly agree; namely, the solution of coöperation. I cannot conceive of coöperation on the principle of "coöperate, damn you." It cannot be done in that way. The coöperation which we have to look forward to, it seems to me, is in the gradual recognition of each other's mutual interests. Coöperation in tariff-making is the pooling of interests, where nations recognize that they need certain raw materials, and need to agree upon production, like the former attempt at the Sugar Union. There should be an attempt by nations to get together and see if they cannot consolidate their respective interests with regard to production, distribution, etc. *There* is a fertile field for international conference and agreement. I must say I feel skeptical, from the point of view of sound principle, concerning any attempt at an international regulation of interests which are fundamentally national and which rest on this proposition, that before you can have any international understanding or any sort of international regulation of interests, you have to begin at home. This proposition is essentially one of national recovery before we can talk in terms of international recovery.

Dr. HERBERT WRIGHT. I notice that Professor Fenwick has gotten out a new edition of his admirable text on *International Law*. I have not had an opportunity to examine it myself, but I was wondering if his textbook touches upon this question. He has asked a number of questions; perhaps he can supply the answers.

The PRESIDENT. Will Mr. Fenwick be good enough to enlighten us on this subject?

Professor FENWICK. I did take the liberty of including in the new edition a chapter on international coöperation. That is largely an attempt to analyze Professor Hudson's four volumes of *International Legislation*, and it presents the subject under the heads of International Public Health, Public Morals, Public Safety, and Economic Welfare. Under the head of Economic Welfare we attempt to discuss the most-favored-nation clause, the open door and the closed door, and the stabilization of currencies.

Coming back to our subject, which I feel we have not got deeply enough into, my thought in regard to the bilateral agreements is that there ceases to be any reason for customs duties when nations have agreed to swap goods. If England has agreed to swap 500,000 tons of coal for so many pounds of Danish butter, there is no point in putting a duty on the butter; you might put a tariff for revenue, but not a protective tariff if you have agreed to take the goods. Is not the line of constructive advance to begin with these bilateral agreements, and abolish all customs duties whatever? The United States will swap so much cotton with Japan for so much Japanese silk. There will be no duty on the Japanese silk; there will be no duty upon the part of Japan on the American cotton. There seem to be two kinds of bilateral agree-

ments, one kind in which we swap under conditions which it is not possible to extend to others because of the peculiar character of the arrangement, and another kind which can be extended to others similarly situated. These latter bilateral agreements might be uniform for special regions if not for the nations at large. I worked it out to my own satisfaction, if only in part.

The PRESIDENT. How did you work it out?

Professor FENWICK. It seems to me that in general where there are bilateral agreements there should be no customs duties; a clear swapping of goods. Both forms of the agreement seem to me to depend upon international as well as national planning. It is obvious that in the past ten years the economic world has changed. Ten years ago there was hardly a man in this country who spoke of too much production and too little consumption. The great industries assumed that they could go on producing and producing. If a man made profits in his industry he had a feeling that he should build a wing onto his factory and make more profits. It never seemed to dawn upon him that unless he gave some part of the profits to the workers, sooner or later there would be nobody to buy his shoes or whatever it was he was manufacturing. By 1929 successive factory wings had been built for cotton, shoes, and other things, and with the additions to their factories, manufacturers were producing in excess of consumption. The possible consumption was there; we had not learned how to get it started. The present administration is feeling its way somewhat blindly; it seems to me that its processes are in conflict. National planning must be merged into international planning. I do not think it is too fantastic to start the international planning, by which goods can be exchanged free of customs duties, beginning with bilateral agreements that may tend to become regional, that is, similar agreements with states in a given region, according to a planned national economy. I should like your observations on the possibility of wiping out customs duties in these bilateral agreements.

Professor MARTIN. I think it is a perfectly plausible idea. However, we are thinking more in terms of one, two, or three years. I think that our experience in international organization, which has not been too fortunate, and the experience of the London Conference, which has been most unfortunate, are somewhat against that procedure. With respect to the bilateral treaty wiping out high tariffs or unreasonable duties, that is what I would like to see done. I can conceive of no country agreeing at this juncture to lifting its general high tariff walls by legislation. I do not know that we have reached the point where we can enter into bilateral agreements which would lead to regional agreements, and then, to global agreements, which would have the effect of displacing the general tariff walls. I think it is in time possible, but not at this juncture.

I agree with Professor Fenwick and others in the points they have raised. For the time being, however, I propose a reversion to bargaining. I tried to show in my paper that neither conditional nor unconditional treatment has

led to appreciable progress in the field of reciprocity. As a temporary expedient, for a period of three years, the reciprocity agreement plan may be worth the trial.

Mr. GEORGE A. FINCH. I know very little of the special subject of tariffs. I think I know even less than Mr. Coudert is willing to admit he knows. But the discussion has suggested a certain idea which I would like to have in the record, and to enlarge upon it for the purpose of justifying the discussion of this subject in this Society. There is some doubt as to whether we have jurisdiction.

There are two ideas which have been developed here that seemed to be antagonistic: one, that tariff-making is a matter for national determination; that we should allow the sovereign nations the fullest opportunity and privilege to protect their own particular interests. The other is that we should have more coöperation among the nations generally in solving these problems. It seems to me that is almost exactly the same problem which we have in the international field in other subjects. We are in a state of transition from the period of military alliances between two nations, or certain groups of nations, for the protection of what they consider their national interests; we are trying to get from that period into another period where we will have collective alliances sustained by the nations in general and having in view the more extensive interests of the world as a whole.

I do not see why it is not the proper function of international law, and of those interested in international law, to try to bring about some amelioration of these economic conflicts, as well as the military or more directly political conflicts which we have discussed in previous years. After all, the economic phases of the differences between nations, I think, are the most important. At present, practically all of our conflicts have an economic basis, and this Society and other societies can, I think, contribute to an understanding of these really fundamental international differences.

To my mind, international law should be as coextensive as national law in attempting to control in a peaceful way, and without resort to violence and force, all of the human relationships that may be involved; and as the relations of nations become more complex, as new questions project themselves into the international field for solution, international law should be sufficiently flexible to be extended to cover such subjects. I am happy to hear these discussions and to see that we are getting away from the cut and dried subjects of international law which are usually treated in the textbooks and which several committees are trying to codify, and that we are considering really important questions that are at the bottom of the principal difficulties affecting the world.

Mr. COUDERT. May I say one further word that, even though this is not purely a matter of international law, it is a fundamental matter of international relations. I remember a very interesting paper written by Lord Balfour, then Arthur Balfour, perhaps the best balanced and most informed and

philosophic mind in the English-speaking world of his time. It was written at least forty years ago and discussed the same questions we have been discussing here today, the general question of free trade and protection, which has so long harassed and troubled and divided the modern world, domestically and internationally. Mr. Balfour, as I remember it, came to the conclusion that there was no conclusion; that the free trader could not appreciate the protectionist's point of view, and that the protectionist could not appreciate the free trader's point of view, because their fundamental ideals were different. One thought in terms of his own locality; that that locality should be self-sufficient; that it should have farmers, manufacturers, etc., and that it should not depend on anybody else, and, in case of war, it should be able to fight anybody off. He also concluded that British interests favored free trade and that interests in other countries favored protection. There being no common social ideal, it was impossible to reach any conclusion.

I believe that the so-called nationalist and internationalist will always differ about this question. There is, however, a growing realization that protection carried too far means war in another form. It was a rather extraordinary statement that recently emanated from Germany to the effect that, "All right, if you do not take German goods we buy nothing from you. We will live, if necessary, on turnips and brown wheat for coffee; we pay no debts and carry out no international obligations. We will be self-sufficient and girded for any kind of war." That is what the protection ideal leads to, in contrast with the idea that the country which is best able to produce a particular product should do so; as Japan should furnish us silk and Cuba sugar, rather than forcing an artificial beet sugar industry upon a country, or an inferior quality of silk because Japanese silk is too high.

I believe it is useless to discuss the fundamentals of it, because it does not belong here except as affecting the larger questions of international relations, and we must discuss it, not from the standpoint of technical law, but from the larger standpoint of international interest. It does seem to me that the protective spirit as now practiced in this day and time is contrary to those international ideals upon which any great expansion of international law and a spirit of international community of interests rest.

Mr. ALBERT LEVITT. It seems to me that I should like to tie together the Chairman's address of yesterday with the address today. There seems to me to be no conflict in the opinions expressed today, and what the Chairman very clearly brought out yesterday. As a lawyer, and only having the qualities of the narrowly analytical mind that goes with some aspects of the law, it seems to me that the international aspects of this matter need to be tied more definitely with the constitutional provisions with which the Chairman dealt last night. I find myself running in vain through the text-books and through the cases for a clear-cut analysis of the Constitution of the United States which will bear upon the treaty-making power which is now so importantly being discussed. I wish it were possible to find an analysis which

would show which of the specific sections of the Constitution of the United States come under the category that say that treaties are entirely outside of the power of Congress and remain simply with the executive, the section dealing with the general power to make treaties to which the Chairman referred, which holds we do not need to consider the express limitations in the Constitution. There are those who call for an exclusive subservience of the treaty-making power to the express wording of the Constitution. There seem to me to be three or four or five categories where you could say that Congress may go so far, the executive so far, and various international groups may go so far, under our constitutional provisions. It seems to me that all of this general discussion, which says we should become internationally minded, must be circumscribed and limited by the fact that we have to consider, before we can become internationally minded, that we must face the question whether we wish, in part at least, to overthrow the present existing constitutional, legal situation as it exists in the United States.

Some of us are not yet ready to overthrow our constitutional situation. We should like to have some guidance and some information which permits us to take the existing Constitution and go as far as we can. I am hoping that out of this discussion will come a series of articles which will give information to those who are seeking light, so they will no longer be simply drowned in the language of general vacuity, on the one side, and held down too narrowly by analytics on the other. Somewhere between the two there is a vast confine where we can rest in safety.

Mr. AKZIN. The discussion today started on the assumption that there is a policy of low or no tariffs, which means international coöperation and is to be encouraged, and a policy of high tariffs, which means nationalism and should be discouraged. Later on, Mr. Coudert brought it down to fundamentals: the one is free trade and the other protectionism.

Professor Fenwick has now injected into the discussion an entirely new and most important question, the question of international economic planning, which carries with it, within the sphere of the desired interchange of goods, an entirely or nearly free interchange, but, obviously, outside of this scope, such planned economy, in order to be protected against an unplanned international exchange, would carry with it prohibitive tariffs, if not embargoes.

I should like to hear the opinions of the leader of the discussion and of Mr. Coudert on that question: whether such development of international planning which would carry with it at once free trade and high tariffs would be described as internationally desirable or undesirable.

The PRESIDENT. Mr. Martin, I think the question is directed to you.

Professor MARTIN. I should say, as an objective, it is desirable. As a matter of immediate realization, it is quite impossible at the present time. I am committed to international planning; I believe in it and I think it is coming, but I think it is more or less of an ideal to direct our attention to-

ward. I think there are concrete situations to which we can extend the agreement-making power which will remedy our present export situation.

I would like to direct one more answer to the question raised in regard to the treaty-making power. I think there is no doubt that the Congress of the United States will not surrender, through the treaty-making power, its control over revenue legislation. Where there is such a treaty, the House will insist upon supporting legislation. The only way this can be accomplished, without supporting legislation, is by means of the executive agreement, which the House itself, under its revenue powers, provisionally agrees to, in the form of unilateral legislation.

With respect to planning, I think none of us need to be convinced as regards its effective realization within the next decade; it is extremely doubtful.

Miss Bessie C. Randolph. Dr. Martin in his paper a few moments ago went into a question, which, it seems to me, will never be solved, at least from the standpoint of constitutional law, from the teaching standpoint and from the standpoint of discussing international affairs with men and women of the lay mind who do not know anything about technical matters, but who are sincerely desirous of having the Senate do the right thing. It is a question which arises in all sorts of forms, namely, the extent of the point where the treaty-making power leaves off and the power of Congress begins. Of all of the cases of the Supreme Court, none seems to have settled it in a satisfactory way, as far as I know.

In Article I of the Constitution of the United States, containing the famous Section 8, there are a list of the powers and the coefficient clause at the end, there are any number of important matters relating to international relations given the Congress. There is a copyright power, the power of raising revenue, supporting armies, providing for and maintaining a navy, etc. As I remember, there are about six of the clauses in that Article I of Section 8 which have already, in one form or another, become the subject-matter of a great many treaties. We have a great many copyright conventions and all sorts of things of that kind, and still, from time to time, people who are interested in the subject are raising the question as to whether the treaty-making power can touch those things at all. Take the limitation of armaments; if Congress has the exclusive right to raise and equip armies and to provide and maintain a navy, what are we doing going into the treaties that we have made on all those subjects? People do not know what to write to their Congressmen or what to write to their Senators in their attempts to get the right kind of action, well advised treaties or legislation bearing on international subjects.

I have not been able to find anywhere a clear legal interpretation of where the treaty-making power leaves off and the power of Congress over legislation begins. It is a subject that many of us have been worrying with. We cannot answer the students, and it is just as one of the speakers said,

there is no place where you can put your hand on a halfway discussion from any source on this subject. I think we have more confusion on this subject than on almost any similar matter of practical politics in this country; that is, what the Senate can constitutionally do in the making of treaties. There are some extraordinary examples; some of our people have contended that the treaty-making power can do anything. As a matter of fact, Congress will not allow it. We have to go along and recognize the practical psychology of Congress and what they will allow the treaty-making power to do. We do not seem to be getting anywhere, and I would certainly like to hear a little comment on that question.

The PRESIDENT. Is there a desire for further discussion?

Mr. DENYS P. MYERS. I do not have in mind discussing President Randolph's comment, but it seems to me that the substantial answer is in the case of Missouri *v.* Holland, where the court says laws are made under the Constitution of the United States and that treaties are made under the authority of the United States; the difference, by virtue of the Constitution and of the authority of the United States, would seem to give a basis for drawing a line.

What I wanted to comment on was the fact that this Society has been somewhat interested in this question for a great many years. I think it was twenty years ago that a series of articles on the most-favored-nation clause, written by Mr. Hornbeck, was carried in the *Journal.*

Ever since that time I have been developing a headache over the conditional and unconditional most-favored-nation clauses, and I finally got what to me was a line on it a year or so ago by examining the *Handbook of Commercial Treaties* got out by the Tariff Commission. It summarizes all of the commercial treaties to show the incidence of the most-favored-nation clause in them. In order to do that, the compilers made an elaborate introduction in which they defined the various ways in which the conditional and unconditional clauses work, and devised a series of words to identify the character of the articles of the treaties in the main body of the text. I read that analysis with considerable interest, and reached the main conclusion that the only difference between the conditional and the unconditional clause is that one starts from the premise that you give the other side a favor on account of something and the other that you give it a favor on no account. By the time all of the exceptions on either side are made, they both come to the same end.

That seems rather obvious, because the tariffs we are talking about are protective tariffs and the characteristic of the protective tariff is that you are going to grab for some advantage, which, unfortunately, is not a national advantage. It is an advantage for some group of nationals, and the protective tariffs have been greatly distorted from the economic point of view as a result of the constant impact of group interests upon individual tariffs.

In our own country, I think there is something like two-thirds of the tariff items on the free list. To me, the free list represents things that we want to take in and upon which there is no competition inside the country. On the dutiable list we seek some advantage, and we have up until the present said that what we did with respect to those articles on which we chose to put a duty was no other state's business whatsoever; in other words, it was exclusively a matter of domestic jurisdiction.

Now, there are lots of things that you may have the right to do, but if you do them they inevitably will have an effect outside. I recall a story of a conversation between Queen Caroline of England and the elder Pitt. Caroline asked Pitt what it would cost to fence in Hyde Park as a garden for Buckingham Palace and Pitt said, "Three crowns." They were not the crowns of the currency, but the crowns on the heads.

The tariff does have an international effect and we are coming to realize that. The negotiations that are going on are intended to modify, or rather to recognize, the effects which the tariff system does have. These reciprocity treaties seem to me to be chiefly directed at the free list. If we can get a certain amount of planning in our income and outgo through trade, by saying that we will take so much of somebody else's goods if they will take so much of ours, it may effect the dutiable list, but it seems to me chiefly to affect the free list. The whole picture would seem to be a fundamental shift from an exclusive view of the tariff as a wholly national problem to its being one with international implications.

Mr. CHARLES WARREN. I am not going to speak on this tariff question, because I must confess that I see very little that a society of international law can do about it. I would like perhaps to relieve Miss Randolph's mind a little, especially in connection with this treaty-making power. I think a good many of us, in discussing constitutional law, fail to make a distinction between constitutional law in the books and constitutional law in operation.

When you come to the treaty-making power, what the Senate and the President can do under the treaty-making power, I suppose, is really a matter of their opinion when they make a treaty, because there are only a limited number of treaty subjects which can ever be tested by a suit in court. For instance, has the Senate power to make a treaty affecting the army and the navy? Suppose it thinks it has and makes such a treaty; how could that be brought into the United States Supreme Court? Has the Senate power to fix tariff duties? Suppose it thinks it has, and it ratifies a treaty, and the House thinks that it must be consulted and must pass legislation. Can we conceive of a President directing the collectors of customs to collect the duties fixed by the treaty, if the House had not acted? No; it is beyond the realm of practical operations that such a thing would take place. As a matter of fact, whether the House is right or not, its action would be absolutely necessary in any practical operation of a treaty.

Take this question of executive agreement; can Congress authorize the President to fix tariffs by executive agreement? Supposing Congress thinks it can and passes such an act. Take what is now proposed, an executive agreement by which the President may lower tariffs under reciprocity. Supposing Congress passes such an act and the President lowers the tariff; how is it going to be tested in court? Who is going to protest? Who is going to bring suit complaining because he gets a lower tariff than was provided in the previous statute? The only likely case would be if the President were authorized by executive agreement to make higher tariffs. Then someone might have grounds for complaining. It is unlikely that anyone is going to complain of a lesser duty imposed upon him than the previous law imposed upon him. It may be an interesting theoretical discussion whether the President may make executive agreements lowering the tariffs, but I cannot see that it has any practical bearing.

So, on this general ground of the general treaty-making power, I must again call Miss Randolph's attention to the fact that it is an interesting theoretical discussion, and that there are a very limited number of subjects in which the scope of the treaty-making power can ever be presented for decision by the United States Supreme Court.

Mr. GEORGE A. FINCH. I would like Mr. Warren to give me some information on this point in relation to the treaty-making power: Suppose that in the course of the next few years we should have a change of sentiment in this country in regard to the question of alcohol, and a personally dry President and a sufficiently large minority of dry Senators to constitute with him the treaty-making power, should make a treaty, the effect of which would be to prohibit the manufacture and sale of alcoholic beverages in the United States. Here is a question upon which the people of the United States, in their sovereign capacity, have passed twice, once prohibiting that traffic and the second time, in a due constitutional way, restoring it. Under the theory of the absolute completeness of the treaty-making power, I understand it would be contended that a treaty having such an effect would be valid; but I am not so sure on that point. If Mr. Warren would say something concerning that question, I would appreciate it. I ask that of him because he stated that there are only a few cases where the scope of the treaty-making power could come before the court, and I think my hypothetical case may be one of them.

Mr. WARREN. How could it come before the court as a practical matter? You are pre-supposing a treaty made between this country and some other country, by which the manufacture of alcoholic beverages would be prohibited?

Mr. FINCH. The same as existed under our prohibition amendment and law.

Mr. WARREN. As a practical matter, can you imagine any President of the United States directing the Attorney-General, or the Attorney-General

directing his officials, to take positive action under such a treaty until there had been a statute of the United States passed to enforce it?

Mr. FINCH. That would not be necessary, because treaties by the Constitution are the law of the land and as such binding upon the judges of every State in the Union.

Mr. WARREN. Yes, but the President has something to say about how the laws shall be enforced.

Mr. FINCH. As an example, take my own State, the State of Maryland; would a Maryland judge be bound by such a treaty?

Mr. WARREN. Binding in what kind of a case?

Mr. FINCH. In a criminal case.

Mr. WARREN. Who would bring the criminal case, a State official?

Mr. FINCH. Yes, some prosecuting attorney in a dry county.

Mr. WARREN. You might get such a case up. I am saying there are only a limited number of subjects in which the validity of a treaty could be brought up. Miss Randolph referred to the power of Congress over the army and navy, which is the kind of a question that cannot be brought up. It is the type of subject which is passed upon, and the manner in which it can be enforced which would bring it within the scope of the courts, and if it was not the type of subject which would bring it within the scope of the courts, then the sole question is what the Senate and President think is the extent of their power.

Miss RANDOLPH. I realize the practical points that Mr. Warren has raised, and also those raised by Mr. Martin, and I have no illusions about the thing being settled before long. But it is a rather serious matter in a country in which we are all hoping for and encouraging a more and more democratic control and intelligent control of the treaty-making power. As it now stands, a great many people who seriously desire and would like to put study on a treaty as it goes through the Senate and on tariff laws or anything that would give scientific legislation or anything that would give scientific international agreements, do not know what to do about writing to their respective Senators when a treaty comes up concerning tariff reciprocity or anything else. They are not willing to waste pen, ink and energy in asking people to vote for a treaty that will be unconstitutional because it will have a head-on collision with a subject exclusively reserved for legislation by Congress.

Mr. LEVITT. May I put a problem which may seem far-fetched?

The PRESIDENT. If you put it to Mr. Warren.

Mr. LEVITT. I will put it to Mr. Warren. We have various treaties which look toward the doing away with the possibility of war. We also have certain regional understandings. We have in my home State very powerful and very efficient munitions factories. Supposing that a taxpayer should bring an injunction against a manufacturer of munitions to prevent him from selling arms to a given government engaged in war, and used as the

basis of his action the supreme law of the land, namely, the treaty; what is the result?

Mr. WARREN. He would be fired out of court.

Mr. LEVITT. In Connecticut we have a jurisdiction where the taxpayer's interests, both State and national, will be considered. It is a peculiar situation. Does it not raise a serious problem which ties in with international law? It seems to me that the so-called distinction between the academic and the classical is a false distinction. There is nothing which so-called practical men, so far as I know, in the last ten years have had to discuss in the halls of Congress which was not first damned as being academic and theoretical until it was found to be something so practical that even Congressmen had to consider it.

Professor WILLIAM I. HULL. May I ask what that Connecticut taxpayer's interest is? Is it a financial interest?

Mr. LEVITT. I do not think so. It is a general taxpayer's interest. I think it not only applies in Connecticut, but I think it is also so provided in various jurisdictions. The theory is based on the taxpayer's interest in the enforcement of the law, which is a general taxpayer's interest. The action is sometimes brought against the Attorney-General or sometimes the government. You have the fact of the law being violated, and that is the thing that gives the taxpayer his standing in court. He may have to bring the proceeding *ex rel.* the individual, but the interest is the taxpayer's interest, because he is paying for the enforcement of the law.

Miss RANDOLPH. I do think there is no doubt about the practical part of Dr. Levitt's point. A great many people would not write to their Congressmen to express their belief that the right of the treaty-making power to restrict armaments is an infringement on the statutory right of Congress in the matter of the war-making power.

Professor LUTHER H. EVANS. I have been bothered a good deal by the same question that President Randolph has been bothered by, and the only solution I have reached in the matter may be briefly summarized. I am not convinced of a completely satisfactory solution of all the problems involved. But it seems to me that the area of doubt as to the treaty-making power can be cut down to a rather narrow scope.

In the first place, as our honored President made clear last evening, the treaty-making power is not delegated in little items as are the powers of Congress. The treaty-making power is a general grant. The only qualification or the only procedure that the treaty-making power apparently must satisfy is that of being made under the authority of the United States; that is, by the President, with the advice and consent of the Senate, two-thirds of those present concurring. Unless from some other source are to be derived limitations on the treaty-making power, then that power could make a treaty on any conceivable subject and it would be the supreme law of the land.

Certain limitations have been asserted. I will take the one that has

been disposed of for all time, and that is the idea that the reserved rights of the States under the Tenth Amendment would be a limitation on the treaty-making power. I think the Supreme Court has definitely disposed of that argument, by asserting that the reserved powers of the States interpose no obstacles whatsoever to the treaty-making power.

Another possibility is that the treaty-making power is limited when it infringes the scope of the authority delegated to Congress. President Randolph has already made it clear that a treaty may cover a subject on which Congress may legislate. If a treaty, by virtue of infringing the jurisdiction of Congress, is not to be regarded as unconstitutional because Congress may come along and cover the same subject and supplant the treaty, the treaty-making power and the legislative power are then on a basis of parity. Suppose Congress raises the army to 150,000 men and a treaty next year limits it to 100,000 men, then the reduction is clearly valid. Congress, however, in the future could restore the army to 150,000 men, if it saw fit. I see no difficulty in connection with that subject.

It seems to me that any matter within the treaty-making power could be dealt with by that power regardless of the fact that Congress has power to legislate upon the subject. But the question arises, and it is a question that is somewhat unsettled, whether a treaty could go so far, let us say, as to abolish the States of the Union and erect us into a national republic, rather than a federal republic. We have on that question only speculation and some vague expressions of opinion of the court. The court has said that the treaty-making power extends to all proper subjects of treaty-making. What are proper subjects of treaty-making? I presume that this question has to be decided by reference to international usage. International usage changes, so that it is necessary always to examine closely the usage of the moment.

The manufacture of arms is clearly, it seems to me, within the normal range of the treaty-making power. There is an allusion made to the question in Article VIII of the League Covenant.

The changing of the nature of our government, it seems to me, is about the only category that the Supreme Court has set up as a limitation on the treaty-making power. What is included in that category? I think we should consider each particular case as it arises and not try to settle the matter in general terms.

Professor Martin's remarks about the House of Representatives recurrently asserting its right to participate in the making of treaties concerning questions of revenue seems to me to raise a practical question, if we may use Mr. Warren's category, and not a legal question. I do not regard it as good constitutional law that the Senate and the President could not make a treaty with revenue provisions. It seems to me they could. I see no ground for asserting that they could not. If one is in doubt as to whether the thing should be done, that is a matter of political consideration and not one of legal consideration. I think the law on the question is clear.

Mr. FINCH. I would like to express my own view that there is a limitation upon the treaty-making power in so far as the exercise of that power may be in conflict with the Constitution of the United States. The grant of power to make treaties under the authority of the United States is contained in the Constitution, and I maintain that the power cannot rise above the source from which it flows. I do not believe that it is possible to amend the Constitution of the United States by treaty, as has been intimated here. I think that when the Constitution says that this instrument shall be amended by the concurrence of three-fourths of the States, it cannot be amended in the Senate upon the advice and consent of the delegates of two-thirds of a majority of those States. There is here, I believe, an express limitation upon the treaty-making power.

Mr. THOMAS H. HEALY. I would like to suggest an idea that may strike you as rather wild—there might be an occasion where the treaty-making power would be big enough to abolish the entire Constitution of the United States! Undoubtedly the treaty-making power is both legal and political; undoubtedly the men who wrote the Constitution knew that one of the primary purposes of the treaty-making power is to negotiate peace after a war. Up until the present time, fortunately, we have not completely lost any war, and we have not run into some of the problems of the settling of peace on the basis that Austria-Hungary had to settle the late fracas.

There is a nation on the face of the globe known as the Union of the Soviet Socialist Republics. They have a very cardinal principle, and that is that the Soviet theory is an international theory; that the rights of the proletariat are a fundamental right, and they have announced that a part of their program is to establish this system throughout the world. Up to date, they have not been successful in a practical way in putting that principle into effect.

Let us assume, as a possibility, that the Soviet Union had, by military strength, conquered the armies of the United States, and suppose, as one of the essential terms of peace, they had insisted upon the acceptance by the United States of the fundamental principle of the Soviets, namely, the communistic, proletarian form of government, abolishing the rights of private property. Suppose they threatened to come in and by armed force destroy our capitalistic system and take full control of our territories, unless we were willing, as a term of peace, to accept their fundamental principle, that the Soviet system of government would be applied in this country? This would be tantamount to abolishing our Constitution and our treaty-making power would not only be the sole organ of our government competent to deal with this situation, but might actually be compelled to accede to the Soviet demands by means of a peace treaty.

Austria-Hungary never suspected in 1913 that she would ever have to make the dismemberment treaties that were made; Germany never suspected in 1913 that she would ever have to make the treaty which she made. If we

lose a war with an enemy of the type of the Soviet, and considering that one of the purposes of the war is to promote the Soviet system of government, and it is laid down as a fundamental requisite of the peace that we would have to accept that system of government, would not that be within the scope of the treaty-making power, as one of the essential powers of the executive and the Senate? If we had to accept that condition, would not that mean the end of the Constitution?

I admit the idea sounds wild and presents an hypothetical case that is very far-fetched. And yet, in theory, I cannot see why the treaty-making power of the United States, in the face of that overwhelming military force, might not be compelled to do it. There is only one organ that can do it, and that is the treaty-making power.

The PRESIDENT. I think we had better adjourn for lunch. The subject will still be open for discussion tomorrow morning.

(Thereupon, at 12.30 o'clock p. m., the session adjourned to meet again at 2 o'clock p. m., Friday, April 27, 1934.)

## THIRD SESSION

### Friday, April 27, 1934, 2 o'clock p. m.

The session convened at 2 o'clock p. m., President JAMES BROWN SCOTT, presiding.

Mr. CHARLES HENRY BUTLER. Mr. President, yesterday at the meeting of the Executive Council, the Chairman was directed to appoint two committees, one to confer with Dr. Rowe of the Pan-American Union in regard to the documentation of the Pan-American Conferences, and that committee consists of Messrs. Herbert Wright, Cyril Wynne and Denys P. Myers.

The other committee was to be appointed to confer with officers of the American Bar Association and the American Law Institute, in regard to the relations of this Society with them, and in regard to the annual meeting. That committee will be composed of Mr. Frederic D. McKenney, Miss Bessie C. Randolph, and Messrs. Manley O. Hudson, George T. Weitzel and Philip Marshall Brown.

The PRESIDENT. No further action is necessary, and the committees are appointed.

The program for this afternoon should be, and doubtless will be, a very interesting one, dealing as it does with two matters of present importance. The first deals with the legal status of aliens under Soviet treaties. It is my pleasure to introduce Mr. Clement L. Bouvé.

## SOME OBSERVATIONS ON THE STATUS OF FOREIGNERS UNDER SOVIET TREATIES

By C. L. BOUVÉ

*Of the Bar of the District of Columbia*

Upon the principle of proceeding from the well known to the relatively unfamiliar, I may perhaps be permitted first to remind this audience of international lawyers and others interested in international law that many of the provisions to be found in the treaties concluded by the Union of Soviet Socialist Republics are substantially the same as provisions with reference to the same matters to be found in the treaties between the United States and other so-called capitalistic countries. These matters include freedom of conscience and religious worship,[1] and the legal protection of person and property,—

[1] Germany, I, Art. 9. The Commercial Treaty between Germany and the U.S.S.R. of Oct. 12, 1925, is composed of seven separate agreements: I. An Agreement Concerning Conditions of Residence and Business and Legal Protection; II. An Economic Agreement; III. A Railway Agreement; IV. An Agreement Concerning Navigation; V. A Fiscal Agreement; VI. An Agreement concerning Commercial Courts of Arbitration; VII. An Agreement concerning the Legal Protection of Industrial Property; and Final Protocol. The Final

matters which were deemed of sufficient importance to require express stipulations in advance of our recent recognition of the Soviet Government.[2] They also include generally the situation of the nationals of one party in the territory of the other; [3] the right of the nationals of either party to enter, leave, travel, reside, and settle in the territory of the other; [4] to engage in trades and professions; [5] freely to offer and dispose of their labor; [6] to acquire, inherit, use, and dispose of their property by sale, gift, will, or otherwise; [7] to enjoy privileges or immunities in connection with the importation or exportation of property; [8] to be free, as foreigners, from the obligation to perform labor as a public service, from military exactions, contributions, or forced loans; [9] to hold their property without fear of being deprived thereof without compensation; [10] in some instances to enjoy the rights and privileges afforded by the poor laws; [11] to be recognized in proper cases as juristic persons with legal personality, and in such capacity to enjoy the rights, privileges and immunities common to such organizations; [12] not to be subjected, as such juristic persons,

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Protocol contains additional articles appended to each separate article of the agreement, each one of which is here designated *Ad Art.* A German Memorial was published by the Reichstag containing comments on the articles of the above agreements and the Consular Agreement of the same date.

[2] Italy, Feb. 7, 1924, Art. 5; Norway, Dec. 15, 1925, Art. 11; Latvia, June 2, 1927, Art. 2; Estonia, May 17, 1929, Arts. 4, 5, 12; Sweden, March 5, 1924, Art. 2; Iceland, May 25, 1927; Germany, I, Art. 10, *Ad Art.* 10, Oct. 12, 1925.

[3] Great Britain, May 16, 1921, Art. 6, and April 16, 1930, Art. 1; Norway, Dec. 15, 1925, Art. 3; Latvia, June 2, 1927, Art. 2; Italy, Feb. 7, 1924, Arts. 4, 5; Czechoslovakia, June 5, 1922, Arts. 9, 11; Iceland, exchange of notes, May 25, 1927; Estonia, May 17, 1929, Art. 4; Austria, Dec. 7, 1921, Art. 8; Japan, Jan. 20, 1925, Art. 4; Denmark, April 23, 1923, Art. 4; Sweden, March 15, 1924, Art. 2; Germany, I, Art. 2, *Ad Art.* 2.

[4] Italy, Feb. 7, 1924, Art. 4; Latvia, June 2, 1927, Art. 2; Great Britain, May 16, 1921, Art. 4; Denmark, April 23, 1923, Art. 4; Norway, Dec. 15, 1925, Arts. 2, 3, 8; Sweden, March 15, 1924, Art. 2; Germany, I, Art. 1, *Ad Art.* 1; Japan, Jan. 20, 1925, Art. 4; Czechoslovakia, June 5, 1922, Art. 12; Estonia, May 17, 1929, Art. 1.

[5] Italy, Feb. 7, 1924, Arts. 5, 8; Latvia, June 2, 1927, Art. 2; Germany, I, Art. 2, *Ad Art.* 2; Denmark, April 23, 1923, Art. 4; Estonia, May 17, 1929, Art. 1; Norway, Dec. 15, 1925, Arts. 2, 3; Japan, Jan. 20, 1925, Art. 4; Sweden, March 15, 1924, Art. 2.

[6] "and to belong or not to belong to trade unions or similar trade organizations." Germany, I, Art. 3, *Ad Art.* 3; and see Austria, Dec. 7, 1921, Art. 6; Italy, Feb. 7, 1924, Art. 10; Czechoslovakia, June 5, 1922, Art. 19; Norway, Dec. 15, 1925, Arts. 3, 9.

[7] See particularly Germany, Oct. 12, 1925, I, Art. 4, *Ad Art.* 4.

[8] Germany, Oct. 12, 1925, I, Art. 5, *Ad Art.* 5; Italy, Feb. 7, 1924, Art. 13; Estonia, May 17, 1929, Art. 3; Latvia, June 2, 1927, Art. 2.

[9] Estonia, May 17, 1929, Art. 11; Turkey, March 16, 1921, Art. 10; Sweden, March 15, 1924, Art. 2; Germany, Oct. 12, 1925, I, Art. 7, *Ad Art.* 7; Denmark, April 23, 1923, Art. 4; Norway, Dec. 15, 1925, Art. 7; Italy, Feb. 7, 1924, Art. 6.

[10] Italy, Feb. 7, 1927, Art. 6; Czechoslovakia, June 5, 1922, Art. 18; Great Britain, May 16, 1921, Arts. 4, 11; Denmark, April 23, 1923, Art. 4; Germany, Oct. 12, 1925, I, Arts. 7, 8, *Ad Arts.* 7, 8; Sweden, March 15, 1924, Art. 2; Estonia, May 17, 1929, Art. 3; Norway, Dec. 15, 1925, Arts. 7, 9.

[11] Germany, Oct. 12, 1925, I, Art. 15, *Ad Art.* 15; Estonia, May 17, 1929, Art. 8.

[12] Estonia, May 17, 1929, Art. 12; Germany, I, Art. 16; Italy, Feb. 7, 1924, Arts. 9, 10;

to special burdens or embarrassments in the conduct of their business; [13] to be free in the territory of the other party to establish or join such commercial organizations; [14] not to be subjected as natural or moral persons, in their capacity of aliens, to a system of taxation other than that generally applied; [15] as masters or crews of ships in the ports of the other party, to enjoy national treatment or such treatment as is accorded masters and crews under the practice of commercial nations; [16] and to enjoy reciprocal or equal rights in respect to industrial property, such as trade marks and patents of inventions, etc.[17]

Without discussing these provisions in detail, I shall invite your attention only to four of the innovations which have been introduced in the field of treaty-making with a view to reassuring foreigners against some of the anticipated consequences of the innovations which have been made by the Russians in the field of social, political, and economic organization. These innovations, I need hardly remind you, are likely to be the subject of earnest discussion when our own government proceeds to supplement by treaty the agreements made by President Roosevelt and Mr. Litvinoff last November.

The four innovations in treaty-making to which I refer are all, with one exception, to be found in the treaty between Germany and the U.S.S.R. of October 12, 1925, which seems to be the most comprehensive of Soviet treaties. They relate to the following matters: (1) Propaganda; (2) Trade delegations; (3) Commercial arbitration; and (4) Inheritance.

### (1) Propaganda

With respect to the first of these matters, treaties have been concluded by the U.S.S.R. with several countries [18] in the sense of the assurance given by

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Latvia, June 2, 1927, Art. 2; Norway, Dec. 15, 1925, Art. 5; Sweden, March 15, 1924, Art. 2; Great Britain, April 16, 1930, Art. 1; Iceland, exchange of notes, May 25, 1927.

[13] Germany, Oct. 12, 1925, I, Arts. 16, 17.

[14] See treaty with Germany, Oct. 12, 1925, I, Art. 18, and *Ad Art.* 18.

[15] Germany, Oct. 12, 1925, V, Art. 1, *Ad Art.* 1; Latvia, June 2, 1927, Art. 2; Italy, Feb. 7, 1924, Arts. 6, 8; Sweden, March 15, 1924, Art. 2; Estonia, May 17, 1929, Arts. 3, 10, 12; Norway, Dec. 15, 1925, Arts. 5, 6.

[16] Germany, Oct. 12, 1925, IV, Art. 1, *Ad Art.* 1; Austria, Dec. 7, 1921, Art. 9; Italy, Feb. 7, 1924, Art. 21; Great Britain, March 16, 1921, Art. 2; Iceland, exchange of notes, May 25, 1927; Latvia, June 2, 1927, Art. 2; Denmark, April 23, 1923, Art. 7; Norway, Dec. 15, 1925, Art. 18; Sweden, March 15, 1924, Art. 4.

[17] See Germany, Oct. 12, 1925, VII, Arts. 1–7, *Ad Arts.* 1, 5; Norway, Feb. 24, 1928; Sweden, exchange of notes, July 21, 1926; Estonia, March 3, 1928.

[18] Art. 14 of the treaty with Austria of Dec. 7, 1921, provides that "the delegations of the contracting parties and persons employed by them shall, in carrying out their work, strictly confine themselves to the duties devolving upon them in accordance with the present agreement. In particular they shall be required to refrain from any kind of agitation or propaganda against the government or the state organizations of the country in which they are temporarily resident." Again, in Art. 8 of the treaty with Czechoslovakia of June 5, 1922, "the two parties covenant that their governments will refrain from any propaganda against the government, the states, and other public institutions or the social or political

Mr. Litvinoff to Mr. Roosevelt last November. You will recall that this assurance was in substance as follows: that, coincident with the establishment of diplomatic relations, it will be the fixed policy of the Government of the U.S.S.R. to refrain and to restrain all persons and organizations under its direct and indirect control from any act liable to injure the United States, and from any act tending to encourage armed intervention or any agitation or propaganda having as an aim the violation of the territorial integrity of the United States or bringing about by force a change in its political or social order; and not to permit the formation or residence in its territory of any group claiming to be the government or making attempt upon the territorial integrity of the United States, or to form or support, but on the contrary to prevent, any recruiting on behalf of military organizations or groups having the aim of armed struggle against this government; or to permit the formation or residence in its territory of any group and to prevent the activity on its territory of any such group, or of representatives or officials thereof planning the overthrow of this government or bringing about by force of a change in the political or social order in any part of this country. A reciprocal assurance, you will recall, was given by Mr. Roosevelt to Mr. Litvinoff.

### (2) Trade Delegations

The outstanding feature of the U.S.S.R.-German treaty of October, 1925,[19] is the official trade delegation established for the purpose of assuring the operation of the foreign trade monopoly of the Soviet Government. This organization has three main functions under the treaty: to develop commercial and economic relations between Germany and the U.S.S.R., and to represent the U.S.S.R. in the matter of foreign trade; to regulate foreign trade with Germany on behalf of the U.S.S.R.; and to engage on its behalf in such foreign trade. The organization is "attached to the Embassy of the U.S.S.R. in the German Reich." This "attachment," it was provided, should be accomplished by granting exterritoriality to the Commercial Delegate heading the delegation, his two assistants, and the members of the Council of the Delegation domiciled in Berlin, and to the premises in Berlin utilized by the delegation for the purpose of its mission.

It may be well at this point to refer to the place which this somewhat ubiquitous creation known as a Trade Delegation or Trade Representation has under the domestic law of the U.S.S.R. Dr. Heinrich Freund's able article in the *Journal du droit international, "L'État Soviétique et le Statut de ses*

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systems of the other contracting party; and also from taking part in the political or social conflicts that may arise in either state."

Similar provisions are to be found in the treaty with Denmark of April 23, 1923, Art. 5, and the treaty with Japan of Jan. 20, 1925, Art. 5.

[19] O. Mersmann-Soest and Paul Wohl, The German-Russian Treaties of October 12, 1925, p. 20.

*Représentations Commerciales,*" is my text in this respect. The trade delegations, organized on broad lines by a decree of November 12, 1923, were regulated in detail by the regulations of March 11, 1924, and are governed at the present time by a decree of September 13, 1933. Under this decree, they constitute an integral part of the diplomatic missions of the U.S.S.R. abroad, and enjoy their diplomatic prerogatives. As stated by Dr. Freund, this incorporation of trade delegations in the embassies shows clearly the conception of the Soviet law according to which the exercise of the monopoly of commerce is an expression of state sovereignty, even in connection with the conclusion of commercial agreements. But this conception differs from that of other states, according to whose views demonstrations of this type of direct participation in commercial activity are completely divorced from the principle of national sovereignty; and this difference in point of view can only be practically solved by recourse to treaty stipulations. But even under the Soviet point of view, the delegations are subject to the service of judicial process; although as to enforcement of judgment the decree of September 13, 1933, is silent. In spite of the fact that under the regulation of that date these bodies are vested with all the powers essential to the accomplishment of their great task—powers characteristic of corporate entities—Soviet doctrine insists that they do not belong to this category, urging as the main reason the fact of their attachment to the embassies. But as Dr. Freund points out, and as the terms of the German treaty make plain, this contention has not received confirmation from other Powers.[20]

Under the treaty, the Trade Delegation need not be registered in the Commercial Register, but the names of the persons authorized to represent it must be regularly published in the Official Gazette of the Reich and brought to the knowledge of the public in any other suitable manner; and they are to be regarded by third persons as duly authorized representatives until notice of the withdrawal of their powers is published in the Gazette.[21] In case it joins or participates in commercial or other associations constituting legal entities, neither the Trade Delegation nor the companies shall be entitled as the result of such participation to claim any privileges, immunities, or favors. It

[20] See the treaty of Norway with the U.S.S.R., Dec. 15, 1925; of Sweden, Oct. 8, 1927; of Italy, Feb. 7, 1924; of Estonia, May 17, 1929; of Greece, June 11, 1929; of Great Britain, April 16, 1930; of Lithuania, Oct. 20, 1931; of Czechoslovakia, June 5, 1922,—all cited by Freund.

[21] Germany, Oct. 12, 1925, II, Art. 3. Assurance was given in the Sessions Protocol that "engagement in all the activities of the trade representation must not and will not be opposed to the provisions of German laws." (Memorial on German treaty: comments on Art. 3.)

Aside from the publication in the Official Gazette of the names of those entitled to represent the delegation, it was agreed in the Sessions Protocol that this information should be furnished by notices affixed to the business premises of that body. (Memorial, comments on Art. 3.)

And the living quarters of those members of the delegation mentioned as enjoying exterritorial privileges are inviolate. (Memorial, comments on Art. 5.)

can deal directly with all government offices in the German Reich, but its activities are confined to foreign trade and kindred matters.

The Government of the U.S.S.R. is bound by all legal acts consummated in the name of the Trade Delegation by the Commercial Delegate and persons whose names are published in the Official Gazette as competent to represent it and their accredited agents. By the term "legal acts" is meant all transactions having a legal effect.[22] The economic effect of such acts performed in Germany is subject to German law and jurisdiction.[23] The property of the U.S.S.R. in Germany may be subjected to compulsory execution, with the exception of objects which, according to the general rules of international law, are required for the exercise of sovereign rights or are intended for the use of diplomatic or consular representatives in their official capacity. It is agreed that the privileges of exterritoriality granted in Articles 4 and 5 shall not be affected either in the domain of private or public law. Bearing in mind that under Soviet law the trade delegations are attached to the embassies as a whole, and that on their behalf, under the domestic law, it is provided that *all* members of these representations who are Soviet citizens enjoy the privileges of exterritoriality,[24] the question might be raised as to the scope of the agreement just read. But the answer seems plain. Article 4 provides merely that the Commercial Delegate, his two assistants, and the members of the Council of the Trade Delegation shall enjoy such privileges. The Soviet law should have no weight in deciding the point; for the existence of a status which includes such privileges depends, under international law, solely upon the capacity in which the state of residence accepts the foreign representative. Under the German treaty no member of the staff of the Soviet Trade Delegation is accepted as a person entitled to diplomatic privileges except those specifically named in Article 4.

The corresponding provisions of the German Commercial Code and other German laws apply particularly to the business activities of the trade delegation, which must meet its obligations as an employer under the public law, except as to nationals of the U.S.S.R. who have been sent to Germany by the U.S.S.R. Commissariat for Foreign Trade. So long as more extensive rights are not accorded by the U.S.S.R. to third Powers, the U.S.S.R. does not accept responsibility for the legal acts of state enterprises which function independ-

[22] *Ad Art.* 6. Legal acts include not only acts coming within the field of private, but of public law. (Mem.: comments on Art. 6.)

[23] Art. 7. The words "economic effects" had already been used in the German treaty with the R.S.F.S.R. of May 6, 1921, in order to establish the duty of the then existing Trade Delegation to pay taxes. With the signing of the present treaty an agreement was reached looking toward the direct taxation of the delegation. With respect to the taxation of the personnel, the delegation assumes the duty imposed upon it as an employer under German law. In the Sessions Protocol the number of persons with respect to whom the obligation does not exist is set at 300. There is no obligation placed on the delegation, under the terms of the final protocol to Art. 7 to publish its balance, nor are there any special requirements as to the method of keeping books. (Mem.: comments on Art. 7.)

[24] See Freund, *op. cit.*

ently of the trade delegation. In order to protect other parties to a contract, such state enterprises are required to indicate in writing to such parties that mere approval of the transaction by the trade delegation, when approval is necessary, implies no guarantee. By state enterprises are meant all enterprises carried on by the state alone or in conjunction with private economic organs; and such enterprises are obliged to meet their obligations as employers in respect to their employees under public law. Their legal acts and the economic effects of these acts are subject to German law and jurisdiction and to procedure for compulsory execution. No limit to liability exists with respect to such property as they have in Germany. The by-laws and balance-sheets of these enterprises and the names of the persons representing them must be regularly published in Germany even if the enterprises themselves have not been entered in the Commercial Register.[25]

### (3) Commercial Arbitration

The constitution and procedure of courts of justice of the U.S.S.R. reflect social and legal trends essentially characteristic of a socialistic state. It is but natural that this should be the case. It is equally natural that capitalistic states, in contemplating the conclusion of commercial treaties with the Soviet Government, should, where the property rights of their nationals in Russia were concerned, have been reluctant to subject them to a process with the practical operation of which they were utterly unfamiliar. It is decidedly to the credit of the U.S.S.R. and its people that, by agreeing to provide for arbitration in commercial matters, they have met, more than half way, the inclinations of their fellow members of the family of nations. By so doing they have assumed a prominent rôle in the present trend, in numerous countries, including our own, toward the substitution of private arbitration for judicial procedure for the settlement of commercial controversies.[26]

[25] The economic development in the U.S.S.R. brought about the existence, in addition to the trade delegations, of a large number of undertakings launched by the U.S.S.R. itself, or in which it participates to a greater or smaller extent. One of the objects of the treaty was definitely to settle the legal situation of these companies. Under its terms these state enterprises are treated in Germany in every respect as are the private undertakings of German nationals. With regard to the question of publicity dealt with in Art. 9, it was agreed at the Sessions Protocol that the requirement as to publicity would be met by information contained in the monthly bulletin (in the German language) of the Trade Delegation of the U.S.S.R.: "From the national economy of the Union of the S.S.R." (Memorial: comments on Art. 9); and further that the meaning of the term "legal acts" in Art. 9 is the same as the meaning attributed to the term in Arts. 6 and 7 (*ibid.*). Concerns engaged in their own name in foreign commerce include individual trusts and syndicates; individual state trading centers; individual joint stock companies founded for handling special branches of foreign trade; banking and credit houses serving foreign trade; certain associations, and certain mixed concessionary undertakings. (Mersmann-Soest and Wohl, *op. cit.*, p. 119.)

[26] Year Book on Commercial Arbitration, prepared by the American Arbitration Association, 1927; International Year Book on Civil and Commercial Arbitration, Nussbaum, 1928; Proceedings of the International Conference of American States on Conciliation and Arbitration, Washington, 1929.

The so-called arbitral clause made its appearance in Soviet treaties as early as 1921,[27] but the Soviet-German treaty of October 12, 1925, was the first to provide in detail both for the constitution of courts of arbitration and for the enforcement of their awards. The following observations are based upon that treaty:

The *subject* of the arbitration provided for consists of "commercial and other civil matters," which do not include questions of personal legal status, family rights, disputes between employers and employees, or disputes regarding the use of land. Agreements to arbitrate questions arising in these excepted fields are without legal effect. This does not apply to concession contracts.

The *purpose* of arbitration must be the settlement of disputes of a legal character in respect of the clauses of a contract or other definite legal situation.

The *parties* to agreements to arbitrate, described as "parties of German nationality and parties belonging to the U.S.S.R.," include the nationals of each of the contracting parties, as well as companies and legal entities of every kind having their headquarters in the territory of one of the contracting parties.

The agreement to arbitrate must be in writing and contain a statement of a definite legal situation, particulars regarding the composition of the court, and particulars concerning the seat of arbitration.

The requirement that agreements be in writing may be met by an exchange of letters. Naturally the conclusion of an agreement to arbitrate in the form of exchange of letters is permissible only if the transaction in question could also have been concluded in the form of an exchange of letters. Agreements to arbitrate meeting the above conditions will be recognized as valid without any further formality. The effect of such an agreement is to withdraw the dispute from the jurisdiction of ordinary courts or other authorities, provided the parties have not agreed otherwise in writing.

With respect to the particulars which the agreement to arbitrate must contain with regard to the composition of the court, or the seat of arbitration, it would seem to be sufficient, for the purposes of its recognition as valid, that it announce that the court of arbitration shall be composed of at least two arbitrators and an umpire, and that the court shall sit in a given state. If the state only is indicated, the capital of the state shall, in the absence of any subsequent agreement between the parties, be the seat of the court. But arbitration agreements shall cease to have effect if the seat of the court of arbitration is in a country with which one of the contracting parties maintains no diplomatic relations when the matter is referred to the court of arbitration, or if such relations are broken off before the court has given its award, or if a national of the country in question has been appointed arbitrator or umpire, or is acting as such, unless the parties have agreed or subsequently agree to alter the composition of the court or transfer its seat to some other country.

[27] Germany, May 6, 1921, Art. 13; Austria, Dec. 7, 1921, Art. 12.

In the absence of any special agreement between the parties—which, I take it, means failure of the parties to agree on the actual personnel of the court or some special method for the appointment of its members—the treaty provides the following method of procedure: The complainant communicates to the other party the name of the arbitrator designated by the former, and requests him to designate an arbitrator suitable to himself. If within a given period the name of the second arbitrator has not been designated, such arbitrator shall be appointed at the request of the complainant. The appointment is to be made by a high court authority of the country in which the court of arbitration has its seat, if that seat is situated in the territory of either of the two contracting parties. If the seat is to be in a third state, the complainant shall request the president of the Supreme Court of the capital of that state to appoint the second arbitrator. Should that official refuse to appoint, the complainant may request any university or chamber of commerce of the third state to make the appointment. Appointments made shall be immediately communicated to both parties.

The arbitrators shall select an umpire by common agreement. In case of their inability to agree, there shall, at the request of either arbitrator, be directed to the authority above-named, in the proper case, a request to compose a list of five suitable persons from which the arbitrators will select one to act as umpire. In case the arbitrators cannot agree, either arbitrator may within two weeks from the receipt of the list request the appropriate appointing authority already mentioned to appoint as umpire one of the persons whose names compose the list. The name of the umpire shall at once be communicated to the two arbitrators. For the services rendered by the courts in this respect no financial charge shall be made. This provision, it goes without saying, is binding only on the two states parties to the treaty. It is assumed that under this procedure each party will accept the arbitrator designated by the other.

The following procedure is adopted in the treaty in the case of the failure to act on the part of an arbitrator or umpire not designated in the agreement: In the case of an arbitrator not thus designated who dies, or for any other reason is unable to act, or refuses to accept or perform the duties of arbitrator, the party designating him must, at the request of the other party, designate another arbitrator within two weeks after the receipt of the request so to do. If no arbitrator is designated in response to the request, he shall be appointed by the appropriate authority mentioned above. Should a similar situation arise with respect to an umpire not designated to act in the arbitral agreement, the arbitrators must immediately by common agreement choose another umpire. Failing this, the umpire shall be appointed by the competent authority under the procedure already discussed. However, here too the provisions are applicable only in the absence of agreements of the parties to the controversy.

If an arbitrator or umpire designated in the agreement to arbitrate—not appointed by the authorities mentioned—fails or is unable to act for the rea-

sons above stated, the procedure covering the cases of failure or inability to act on the part of umpires or arbitrators officially appointed applies by analogy, unless the parties have agreed that in such case the agreement to arbitrate shall cease to have effect. Should one of the parties to the agreement die, the agreement is cancelled in the absence of other agreement to the contrary. And if, following reorganization or dissolution or other cause, one of the parties ceases to exist as such, the government of which such party is a national, upon the other high contracting party informing the latter as to the competent body before which arbitration proceedings may be brought, may continue, provided its own legislation does not contain special provisions applicable to the case.

Where objection is made to an arbitrator, the question will be decided in accord with the law of the state in which the court of arbitration has its seat; and the law will be applied by the authorities upon whom the power of appointment of umpires and arbitrators rests under the treaty.

Such awards as are rendered by courts of arbitration must include the date when and place where the award was rendered, show the composition of the court, and that a hearing has been given the parties. It must be signed by the arbitrators, and a signed copy must be transmitted by the arbitrators to the parties. The award need not contain a statement of the grounds on which the decision was reached. Awards valid under the terms of the treaty shall have the effect of a final judicial decision, and shall be recognized as executory in the territory of the other contracting party. The execution of such awards is guaranteed by the parties to the treaty, and such execution may be ordered by any court which under the local law would have had jurisdiction over the case, in the absence of special provisions to the contrary in the agreement to arbitrate. The party defendant has the right to a hearing, however, before the rendering of a decision.

The above provisions refer to awards valid under the treaty. If invalid in this sense, an order for execution may be refused. Thus execution may be refused in case the award involves a settlement with respect to matters connected with personal legal status or family rights, disputes between employers and employed, or disputes with respect to the utilization of land; for such matters do not come within the jurisdiction of the arbitral courts which may be erected under the provisions of the treaty. Where the parties agree as to the constitution of the arbitral body, and the court is not thus constituted; or where it is constituted in accordance with such agreement, and that agreement does not provide for at least two arbitrators and an umpire; or where, the parties having been unable to agree upon its constitution, the arbitral court which hands down an award is constituted other than in accordance with the methods provided by the treaty to meet this situation, execution may be refused. Such action would simply constitute a refusal to honor an award rendered by a body which, in so far as powers created by treaty were concerned, was acting without jurisdiction. Nor will an award be executed if it is established that one of the parties to the arbitration agreement was not represented in conformity

with the laws of his country when that agreement was drawn up, or where the arbitration procedure was decided upon, unless he has expressly agreed to such procedure. The above refusals to order execution of arbitral awards are predicated, as indicated, on insufficiencies of jurisdiction, to the extent that jurisdiction alone carries with it the right to the execution of awards rendered. But such execution may be refused on the basis of a deficiency in the conduct of the proceedings. That is to say, such refusal may be predicated upon an absence of the "necessary hearing." Such is the term used in the English translation.[28] It seems inadequate. The phrase used in the German original is "*rechtliche Gehör*";[29] in the Russian original, a phrase which when translated reads "if one of the parties . . . is not given the opportunity provided by law to present his case";[30] the French translation reads: "*si, au cours de la procédure, la partie n'a pas été entendue conformément aux lois.*"[31] We may assume that what is required is what corresponds to our legal term "a fair hearing"; and that the execution of an award might be refused in accordance with the intent of the treaty where as to the matter of a hearing the form had been met but the substance ignored.

Execution may be refused if the party produces an award which has been given on the same question and has already entered into force as *res judicata;* and it may be refused if there exist conditions which would warrant an action for restitution under German law, or a reopening of the proceedings under Soviet law. Finally, execution may be refused if the execution to which the award has sentenced the party is inadmissible under the law of the country in which execution would otherwise be ordered.

The above are the only grounds upon which the execution of an arbitral award may be refused. It is to be observed that, as far as the wording of the treaty is concerned, there is no obligation on either party to refuse execution on such grounds. The Russian text uses the phrase "may be refused," and while the German text "*ist nur zu versagen*" is less definite on the point of power, it is open to the same construction as the Russian in this regard. However, the party defendant *must* be heard before action is taken on a petition for execution of an award, and the discretion of a state to proceed to an execution on an award tainted with any of the disabilities mentioned, if such discretion otherwise exists, could not well be exercised in the absence of waiver of rights by the party interested.

The treaty provides that there shall be no re-examination of the case on the merits. This must be so unless for an arbitral determination of questions submitted there is to be substituted a judicial determination. The desire of the parties is to abide by the determination of A, B and C, persons of their choice; or of X, Y and Z, selected on their behalf and with their consent in the absence of an ability on their part to arrive at a mutual selection of arbiters. They do not want a judicial determination on the merits; and to subject the

[28] League of Nations Treaty Series, Vol. 53, p. 141.
[29] *Ibid.*, p. 64. [30] *Ibid.*, p. 65. [31] *Ibid.*, p. 140.

parties to a judicial revision of the facts and law as found by the arbiters would remove the procedure from the field of private arbitration.

However, if an arbitral court finds to be necessary certain legal action which it is itself not competent to take, it may request that such steps be taken, and they will be taken, if not contrary to the domestic law, by a local court having jurisdiction over the type of case submitted to arbitration.

The treaty provides that in the settlement of questions submitted to them, courts of arbitration shall adhere to the rules of international usage, taking into account all the considerations brought to light by their discussions and inquiries. Fundamentally, the law to be observed in these instances is that which is either expressly stipulated as such by the parties or attributed to them by necessary implication, or applicable according to generally recognized rules of private international law. Of course international commercial usages must be observed in connection with the decision reached, but not to the exclusion of other considerations.

The provisions include in their application the two high contracting parties, either as principal or intervenor. This applies to the participation of states forming part of the two parties to the treaty or of the Federation of the Soviet Republics.

### (4) Inheritance Provisions

The Consular Convention of October 12, 1925, between Germany and the U.S.S.R., contains certain features which have been characterized by eminent authority as new and unusual. I have noted them in the record, and shall limit myself to a few observations on the Annex to Article 22 of that convention, which is there entitled "Agreement concerning Inheritance."

The agreement in the Consular Convention with respect to inheritance places upon the consul and the local authorities the duty of mutual communication of all essential data bearing upon inheritance in the case of the death of a national of the consul's state; [32] of mutual action—separate if one party fails to act—with respect to the taking of measures of security or their withdrawal; of announcements by the local authorities concerning probate and the summoning of heirs or creditors. While the settlement of the succession is left to the heirs and local authorities, the consul may take over the estate at any time and may demand that all property and documents of the deceased,

[32] Mersmann-Soest and Wohl characterize as new and worthy of note the provisions giving the consul the right to exhibit the flag of his country on vehicles of all kinds when on official errands (Art. 4); the inviolability of the private dwellings of consuls (Art. 5); "in view of the peculiar conditions in Soviet Russia," the unusually detailed provisions exempting the consuls from military burdens, confiscations and requisitions, and the exemption from taxation of consular employees (Art. 6); the free importation and exportation of the private property of consular officials and of consular equipment (Art. 7); the freedom of withdrawal from the country of consular officials and their families upon the breaking off of diplomatic relations (Art. 8); the meticulous care with which the matter of the subjection of consuls to arrest has been considered with reference to the laws of both countries (Art. 11); and the right of consuls to perform the marriage ceremony (Art. 19). *Op. cit.*, pp. 44, 45.

including the will, be turned over to him. These he must keep in the country during administration. He may take all necessary steps to preserve the estate or to meet the public law obligations of the deceased or his heirs, and he may administer the estate. He may administer or wind up existing undertakings, dispose of perishable goods, and collect usual costs and charges from the estate. The property in his hands is subject to execution and bankruptcy proceedings and must be handed over to the authorities upon request; but in any event he may defend the interests of the estate in these proceedings. Six months after the death of the deceased the consul may hand over the estate to the heirs after settlement of public obligations and other claims. If the consul does not take charge of the estate, it is within the same period turned over to the heirs by the local authorities under the conditions outlined above, but if their rights are not established the authorities hand the estate over to the consul.

The foregoing is applicable to movable property; the local authorities alone have the right and duty to dispose of immovable property, just as they do in the case of nationals of their own country; but the consul is furnished with an inventory of immovables as soon as possible.

It was agreed in the annex to Article 22 that the legal situation as regards succession to movable property should be determined by the laws of the country of which the deceased was a national at the time of his death, the immovable by the laws of the state in which the property was situated.

Under the Soviet law, as the members of this audience doubtless know, all land is the property of the government, but private ownership of buildings and building rights is permitted. The practical application in Soviet territory of the treaty provision just mentioned is therefore restricted to buildings and building rights. To make this situation clear, a paragraph was added to the annex specifically providing that the principle of the applicability of the local law to immovable property shall apply in the territory of the U.S.S.R. to buildings of every kind and hereditary building rights.

As stated in the German memorial on the German-Soviet treaties of 1925, the right of the individual to inherit personalty was limited (with certain exceptions) to the sum of 10,000 gold rubles, the excess reverting to the Government.[33] The number of persons who could inherit was limited (and is still limited) to the direct line—children, grandchildren, great-grandchildren—to the surviving spouse, and to persons incapable of support who were actually supported by deceased for the year preceding his death.[34] Under the nationality principle, the reversionary right of the Union might, it was felt, lead to delicate situations with respect to personalty left by a Soviet citi-

[33] See German Memorial, comments on Annex to Article 22. Art. 417 of the Soviet Civil Code, which contained this provision, was repealed by resolution of the All-Russian Central Executive Committee, and the Council of the People's Commissars of the R.S.F.S.R., Feb. 15, 1926.

[34] Soviet Civil Code, Art. 418.

zen dying in German territory, such as a reversionary right of participation in German corporations. Therefore it was considered essential by the German Government that in all such cases the estate should be liquidated and the proceeds of the balance turned over to the inheriting state.[35] This situation was met in the treaty in the sense contemplated. With respect to immovable property, it was provided in the treaty that only the state in whose territory the immovable property forming part of the estate is situated should enjoy legal rights of succession or reversion.

The four treaty innovations which I have just discussed constitute, as I indicated at the beginning, a part of the machinery for the reconciliation in practice of widely divergent conceptions as to the functions of the state in social and economic fields. I need not remind this audience that the most important factor in the relations between any two countries is not what is put into their treaties, but what is implied in their treaties. The most detailed provisions in a treaty or a contract cannot afford a satisfactory basis for relations unless good will and good understanding exist between the parties. A treaty provision is like a law or regulation in that it is primarily a formulation of a standard of conduct which is observed more or less instinctively by persons with a fully developed social conscience. A treaty provision, like a law, facilitates the process of compelling the anti-social person to observe the obligations of what I may venture to call the good neighbor. Within the next year or two the representatives of our government will doubtless be engaged in efforts to provide adequate treaty protection for Americans in the U.S.S.R. They may presumably find it desirable to follow in many respects the precedents which have been established in treaties such as that of October 12, 1925, between Germany and Russia.

The PRESIDENT. The second paper of the afternoon will be on the effect of applied communism on the principles of international law. We are happy to have present on this occasion Mr. T. A. Taracouzio, Head of the Slavic Department, Harvard Law Library, who will speak on this question.

## THE EFFECT OF APPLIED COMMUNISM ON THE PRINCIPLES OF INTERNATIONAL LAW

By T. A. TARACOUZIO

*Head of the Slavic Department, Harvard Law Library*

It is a commonplace that the World War and the physical, moral, and economic devastation of the years 1914–1918 provided an exacting test of the principles of international law. Along with having intensified the fundamental longing of humanity for peace, the experience of those years brought about an acute realization of the fact that many of the traditional rules were no longer adequate and that the law had been outstripped by the growth of

[35] Memorial, comments on Annex to Article 22.

the civilization it no longer reflected. The result was that vigorous, coordinated effort has been made to readapt the old system to the new circumstances, both by discarding outworn rules and by introducing new principles.

A direct challenge, however, of these ancient shibboleths was furnished by the State of Soviets, the proletarian successor of Imperial Russia. However disconcerting the questionings of this novel state, and however widely its aspiration may differ from those of states of the older political theory, they coincide, at least formally, so far as the desire for peace is concerned. Different as are the conditions of perpetual peace in the Marxian theory and those contemplated by the adherence of conservative thought, both the U. S. S. R. and the rest of the nations are constrained to rely upon the precepts of international law as the only means to this end. The size, geographic position, and economic resources of the U. S. S. R. warrant a suggestion that a political *rapprochement* between the systems of capitalistic and communistic philosophy is essential for achieving even a semblance of harmony among the nations. Hence international law must be made to undergo certain distortions. Whatever the achievements of the non-communist world in that direction, a conscious attempt is now being made by the authorities of the Soviet régime to modify the principles of international law in conformity with the communist theories.

To properly evaluate the degree of the success achieved in their attempt, a brief outline of the communist conception of international law is necessary as a preliminary to the survey of the actual Soviet practice. The Marxian understanding of international law may best be deduced from the communist conception of the three basic factors upon which the whole system of international law rests: the substance of law, the character of the parties to international intercourse, and the essence of international relations. As an integral part of political economy, *i.e.*, as one of the aspects of the materialistic social process historically manifested in the guise of the class struggle resulting from the inequality of man, law for a Marxist is nothing but a juridical formula of the relation between compulsion as a derivative of inequality, on the one hand, and class as an exponent of the economical aspects of the community, on the other.

As to the second aspect, according to the general principles of international law, the parties to international intercourse are political states. In Marxism a different logic prevails. Here an analysis of society reveals three underlying bases for every community of men: firstly, material forces of production; secondly, relations generated by the production which *in toto* form the economic skeleton, *i.e.*, the real basis of the community; and, thirdly, the body of rules which govern these relations and constitute the legal and political structure superimposed upon the community by forces germane to the community itself. When in the guise of the state, the communist society becomes a tool for class hegemony it, in turn, generates the class struggle.

In other words, the state for the communists is a struggle of classes. Since, however, no struggle *per se* can be considered as a party to international intercourse, it follows that theoretically for the communists it is an integral component of their state—the class—which becomes the party in international relations. The outlook of the Soviet State on the surrounding world is determined by the rôle ordained for every communist by the Marxian theory. Consequently, international relations for communists cannot be anything but the interaction of class struggle and oppression, which because of its varying degrees in different countries determines the course of mutual coöperation of the toiling masses in the guise of international political conduct.

To summarize: the communist conception of law as a manifestation of compulsion resulting from inequality, of state as a struggle of classes, and of international relations as a mutual coöperation of toiling masses in their common opposition to capitalism, together with the temporary, provisional nature of international law, result in a novel interpretation of international law as a transition stage of a new, provisional inter-class law which determines and regulates the inequality of the rights and duties of the internationally organized national laboring classes in their common struggle for proletarian world supremacy. Such is the communist abstraction of international law.

Bearing in mind the fundamental aim of communism—a classless and stateless commonwealth—the world revolution would spell the advent of a single world-wide denationalized society where there will be no place for a system of law regulating the international life of independent states. International law will be converted into a purely domestic inter-Soviet law, a federal law for a world-wide Union of Socialist Soviet Republics. However, the communists were disappointed in their hopes for the immediate realization of this world empire. Instead they found themselves surrounded by states that refused to conform to their political philosophy, and confronted with the alternative of complete isolation or compromise with the existing rules governing the foreign relations of states. Economic necessity dictated the establishment of intercourse with outside states. Hence, communist lawmakers, instead of attempting by a single official denunciation to sweep away the existing complex of rules governing international relations, contented themselves with invoking international law as expediency might suggest, and in the meantime busied themselves with transfusing its tenets with their own political philosophy.

A brief outline of this undertaking is now to be analyzed. Limited space necessitates a reduction of this outline to a mere skeleton survey of the Soviet approach to the principles of international law. Hence mention can only be made of such outstanding issues as: sources and parties of international law, nature and rôle of the state, conception of sovereignty, principles relative to territory, rules governing the status of individuals, problems connected with diplomacy and consular service, major aspects of treaties and treaty-making, and, finally, regulations concerning international disputes, war, and neutrality.

Custom, implying a usage rooted in pre-Soviet days, is naturally not accepted by Soviet authorities as a reliable source. Yet to prevent an open conflict with states admitting the value of custom, the policy of referring to it as an authoritative source is apparent in the Soviet practice. While in the practice of non-communist states a treaty is often merely declaratory of international practice, in the U. S. S. R. the treaty has become the basic source of international law. Moreover, as multipartite conventions are more apt to represent the crystallization of traditional theories, the tendency of the Soviet State has been towards the bilateral treaty. There is a suggestion, furthermore, found in Soviet records that other time-honored sources, such as references to diplomatic documents, national legislation, court decisions, and learned works, are not entirely disregarded by the Soviet authorities as factors in shaping the law of nations.

The attitude of the Soviets towards the problem of persons in international law is not conclusive. The definition of international law, as given above, suggests that the latter is not applicable to the intercourse of states exclusively, yet it does not allow individuals to become the sole persons in international law. The Soviet attitude towards such international bodies as the European Commission of the Danube, the Commission of Straits, the International Red Cross, or the Hoover Relief Administration in Russia, and even the Pope, permits the conclusion that states are not considered by the Soviets as the only subjects of international law.

Ardent sponsors of the freedom of national self-determination, the Soviets are consistent in their readiness to consider, at least theoretically, states under disabilities, protectorates, mandated territories, self-governing dominions, etc., as well as uncivilized and nomadic tribes, as competent parties in their relations with the outside world. Seeing, furthermore, in the purely professional intercourse among the labor unions of the world a political factor of great significance in international life, it is likewise only logical for the Soviet Government to attach to them a status of distinct persons in international law. On the other hand, the individual—merely an integral part of the class—is not a person in international law for communists. Paradoxical as it may appear, for communists, as well as for conservative scholars, the state remains the prime person in international law.

To overcome the confusion caused by the fact that the communist abstraction of state as a class struggle is not adopted by other nations as sufficient to constitute the body politic qualifying as a full-fledged member of the family of states, the Soviets in their international life were forced to pretend to consider themselves a juridical person in the classical sense of the term, and since no struggle *per se*, as said, can participate in international intercourse, a second aspect was accorded the state. As explained by Engels, a state *ipso facto* presupposes a communal authority which stands separately from the masses composing the community.[1] In this sense the state for the

[1] Engels, Origin of the Family, p. 63.

Marxist is in reality a governing authority superimposed upon the community and necessary for the regulation of class conflicts. According to Marx, the external form of the state is a governmental machine, which forms an organism of its own separate from the community, and becoming constantly more isolated therefrom.[2] When applied to the Soviet Union, this means that the state must have a dual political personality: theoretically it is an economic struggle of classes, while practically it is a dominating political instrumentality superimposed upon the community to regulate this struggle. There is no doubt that for international law it is the dominant regulatory aspect of the Soviet State which is of prime importance. Consequently, it is this "concrete" Soviet State which the communist dictators pretend to consider in their international relations as the party in international law.

The form of the state is of no significance to the Soviets. Be they simple or compound, for them the states are merely temporary international phenomena in the process of self-annihilation. Since international law deals with states already in existence, it is likewise unimportant for the Soviets how the states come into being. As to recognition of states, the Soviets consider recognition both essential for being admitted into international intercourse, and an act of state itself. The various ways of recognition, such as peace treaties, special declarations, and diplomatic notes, have served to evidence that the Soviet practice in this respect does not differ from that of other states. The distinction between *de facto* and *de jure* recognition has likewise been admitted by the Soviets.

The dynamics of the state, involving the principles of continuity and responsibility in state succession, territorial changes, and the determination of states, are fully appreciated by the Soviets. The general rule is that the international personality of a state is not affected by changes in its social order or in its form of government. For the Soviets, this theory holds good only when the social and political revolution results in no change in the class structure of the state. Hence they claim that it can have no application to the U. S. S. R., and it is on this basis that the Soviet Government attempts to justify its decree of January 28, 1918, repudiating all foreign loans.

The relation between the traditional and the communist attitude towards the effect of territorial changes is less clear. Their attitude towards the duty of the receiving state anent the obligations of the entering unit seems to be contrary to both their theory and their practice. Likewise obscure is the attitude of the Soviets toward the situation where a new state emerges as a result of the dismemberment of another one, although the international practice of the Soviets seems to indicate that they do not follow the principle by which the new state partakes proportionally in the financial obligations of the state from which it has sprung.

In regard to the termination of states, the Soviet practice offers no instances of the complete absorption into the domain of another state, although

[2] Marx, Critique of the Gotha Program, p. 71.

the communist opposition *ex principio* to forcible annexation indicates that it is not considered by the Soviets as proper and justifiable. The other manner of termination of state by dissolution into independent states seems to be completely in harmony with communist theories. Indeed, it is but a step further than the doctrine of self-determination: the resulting units may subsequently combine in a new entity, organized upon economic rather than political lines, and the approach to the ultimate world commonwealth will be furthered to that extent. The case of Russia is an illustration *par excellence*.

Although not considered as one of the fundamental characteristics of the state, sovereignty becomes essential for the Soviets when applied to the working of international law. There are two outstanding phenomena in regard to the communist approach to the problem: the spontaneous right of the proletariat to struggle against capitalism, and the paramount right of self-determination for nationalities. It is upon these aspects that the Soviets evolve a unique conception of sovereignty—for them an essential for the progress of world revolution—as a paramount proletarian right for international social reconstruction manifested temporarily in class struggle and national self-determination. As a consequence of such abstract metaphysics regarding sovereignty it is only natural for the Soviets to champion the cause of national minorities, colonies, and all other countries under disabilities against their imperialistic overlords. As a consequence of political expediency it is likewise only natural for the Soviets to sponsor ardently the principle of equality of states with all the rights germane thereto, and, consequently, to oppose, at least formally, intervention and extraterritoriality, admitting at the same time that along with enjoying their rights the states have also duties and are subject to liabilities in the generally accepted sense of the term. Both national laws of the Soviet State and its international practice offer no little proof of this and call for no detailed analysis. It will suffice, therefore, to summarize the Soviet attitude towards sovereignty as a conscious subjection of theoretical aspirations to concrete political necessities. The practical exercise of the provisional manifestation of communist sovereignty—class struggle and national self-determination—is confined by the Soviets to the administration from the Kremlin of the national and class problems within the U. S. S. R. only. In dealing with the international aspects of the problem, the Soviets are content to see it left in each individual case to the interpretation dictated by the political wisdom and diplomatic skill of the moment. By so doing the Soviets have offered no solution for the most outstanding problems connected with sovereignty, for its nature and limitability are still open to dispute.

In spite of the Marxian abstraction of the state, in practice the Soviet authorities admit the importance of the problems connected with territory and consider that of the U. S. S. R. as a geographical limitation of the space over which the dictatorial authority of the proletariat extends. It is not surprising, therefore, that meticulous consideration has been given by the Soviets

both in national laws and international practice to such problems as state boundaries, acquisition of territory, and the nature and extent of the territorial jurisdiction of the state. Introducing nothing new in regard to the former, the Soviets must be credited with some novel suggestions in regard to the acquisition of territory. Theoretically, all classical methods, except those involving force, are acceptable to communists. In the practice of the Soviets, however, only two of the methods of peaceful acquisition have been recognized: plebiscite and discovery. While conservative in regard to the rules governing plebiscites in international practice which are in accord with the principle of national self-determination, the Soviets have placed the problem of discovery on quite a novel basis. Denying the occupation of discovered lands as an essential in vesting rights of sovereignty, the Soviets went still farther in their theory of discovery when on April 15, 1926, the Central Executive Committee of the U. S. S. R. in a special decree declared

> . . . all lands and islands located in the Arctic to the North between the coast line of the U. S. S. R. and the North Pole, both already discovered *and those which may be discovered in the future,* which at the time of the publication of the present decree are not recognized by the Government of the U. S. S. R. as the territory of any foreign state. . . .[3]

When deciphered, this decree means that the doctrine of discovery is not applicable to the Arctic, for the sovereignty to the lands in the Arctic automatically vests with the state within whose sphere or sector of "terrestrial gravitation" the land is found.

The jurisdiction exercised by the Soviets over the territory of the U. S. S. R. does not deviate from the general practice of territorial jurisdiction of other states. Like any sovereign state, the territory of the Soviets besides land includes also water and the air space. Offering no outstanding variations of the general practice, the Soviet laws prove that the significance of the distinction between inland waters, international rivers, territorial waters, and high seas is fully comprehended by the communist authorities in the U. S. S. R. Special mention must be made, however, of the fact that while adhering generally to the common rules of international law regarding waters as national domain, the Soviets are inconsistent in their practice in regard to the high seas in the Arctic. The theory of "terrestrial gravitation" here amounts to a subdivision of the whole open sea of the Arctic among the states subjacent thereto. Yet the Soviet decree of May 21, 1921, and the statute of June 15, 1927, established the twelve-mile limit for Soviet territorial waters without excluding the Arctic from this provision.

Little need be said in regard to the Soviet attitude toward the air space. The Soviet Air Code of 1932, defining the position of the Soviet State toward the air space, prescribing the rights of foreigners in regard to the latter, and outlining the rules concerning the administration of the Soviet air domain,

[3] *Sobr. Zak. i Rasp. S. S. S. R.*, 1926, p. 586.

shows that the Soviets consider the air space as part of the Soviet State *usque ad coelum* with all the consequences resulting therefrom.

To summarize, by introducing their theory of "terrestrial gravitation" the Soviets place themselves ahead of any contemporary school of international law. By adding the air space to the land and waters comprising their domain, they prove themselves to be well to the front with every phase of progress made in international law. By justifying their international claims in certain instances by reference to old agreements and general rules of international law—they admit that there are legal principles which are binding upon the Soviet régime, even if in disagreement with their political philosophy.

Problems connected with physical persons in international law have been given considerable attention by the Soviet authorities. Yet, in spite of the fact that the communist absorption of man by the class logically would give cause to expectation for a great number of innovations in regard to his status in the light of international law, the Soviet practice reveals nothing but another proof that theoretical abstractions must often give way to the dictates of concrete reality. Indeed, even a brief analysis of the Soviet approach to the whole body of rules relative to physical persons would readily substantiate this. While aiming at ultimate denationalization, the Soviets have definitely emphasized the necessity of each individual having political nationality; they have outlined the ways in which this nationality is acquired and lost, and have prescribed the rights and duties connected therewith. In its crusade of defense of the proletariat, the Soviet Government has given foreigners political rights more extensive than any other state has ever given. One of the first willing to relieve married women from following the nationality of their husbands, the Soviet State at the same time claims the citizenship of children by virtue of both *jus sanguinis* and *jus soli*. Fully cognizant of the fact that it is left to the state to establish by means of national legislation its own rules governing the rights and duties under discussion, the Soviets have made it manifest that in this regard they have not deviated from the general practice of other nations. As an exception to this conformity of the Soviet practice with the general rules of international law regarding physical persons, mention is proper of Article 3 of the Criminal Code of the R. S. F. S. R. of 1922 which provides that

> The effect of this code is extended also to foreigners arriving in Russia who have committed [even] outside of the territory of the [Soviet] Republic any crime against the Government and military strength of the R. S. F. S. R.[4]

The vagueness of the distinction between the Soviet definitions of political and non-political crimes[5] can readily suggest that this provision was by no means a hidden attempt to place a crime against the proletarian cause as an

[4] *Sobr. Uzak. i Rasp. R. S. F. S. R.*, 1922, p. 202.

[5] Arts. 6 and 58 of the Criminal Code of the R. S. F. S. R. of 1926 (*Sobr. Kodeksov R. S. F. S. R.*, 4th ed., pp. 654 and 665).

international offense with all the consequences germane thereto. However, this provision no longer appears in the latest Criminal Code of the R. S. F. S. R. promulgated in 1926. As to the principle of extradition, the Soviets admit its import in international law. Yet, while manifesting no objection to extradition, even of its own citizens, and while leaving the sanction of the Soviet Government to extradition to be decided upon separately in each individual case, the Soviets have themselves refrained from concluding extradition treaties; one of the feasible reasons for this being the above-mentioned vagueness of the distinction between the Soviet understanding of political and non-political crimes. Having made no effective contribution to international law in regard to the rules governing physical persons, the Soviet laws and international practice once again prove that international law will not change until relations between peoples have changed their limited, international character to a universal one.

Problems connected with diplomacy and consular service are too well known to elaborate upon each one separately within this space. It will suffice, therefore, to say here that the Soviets do recognize the distinction between these two branches of foreign service, and that in so doing they follow in general the well established practice relative thereto. There are four novel ideas, however, found in the Soviet laws which deserve attention herein, in spite of their being primarily of a theoretical value. The first and the most outstanding is the abolition of the traditional distinction between the ranks of diplomatic agents. On the ground that this distinction was not in conformity with the principle of equality of states, on May 22 (June 4), 1918, a decree was passed establishing a single rank of Representative Plenipotentiary. While the provision of this decree never found legal confirmation after the U. S. S. R. was formed, the uninterrupted application of its principle by the Union suggests, however, that the decree continues to remain in force. Whatever the legal aspects of this act, in practice the Soviets were forced to resort to special international agreements in derogation of the provisions of their own legislation.[6] Whether or not the abolition of diplomatic ranks by the Soviets has proved beneficial, the fact is that this idea has not been left entirely without consideration on the part of non-communist states, evidence to this effect being found in the work of the First Codification Conference at Geneva in 1927.

The other novel idea introduced by the Soviets is the office of the Commercial Representative, who actually replaced the commercial attachés. The difference between the two is that the Soviet Commercial Representatives, besides the regular functions of commercial attachés of non-communist states, have the additional capacity to conclude independent trade contracts on be-

[6] On Jan. 15, 1924, an agreement was signed with China to the effect that their diplomatic representatives were mutually elevated to the rank of Ambassador. An official dispatch of Dec. 25, 1928, addressed to the Afghanistan Government, notified the latter that the diplomatic representatives were henceforth elevated to the same rank.

half of the Soviet Government, which, in Soviet practice, very often acquired the character of political agreements. The increased political rôle of these Soviet agents abroad calls for no further comment, yet the submission of their juridical acts to the local civil jurisdiction prompts the assumption that warrants may be served upon the property of the Soviet State abroad, except upon articles which, according to the general principles of international law, are recognized as necessary for the execution of official business by diplomatic or consular officers in foreign countries.

The next outstanding innovation is in regard to customs duties and to the use of diplomatic mail. As to the former, in 1921 three decrees were passed by the R. S. F. S. R. which relieved diplomatic agents from customs duties, exempted the luggage carried by diplomatic couriers to diplomatic agents from similar duties, provided, however, that the luggage should be examined at the point of expedition by duly authorized agents of the People's Commissariat for Foreign Affairs, and limited the gross weight of the diplomatic luggage for each member of the foreign diplomatic mission to two poods (a pood is 36.11 pounds avoirdupois) per month. On May 31, 1922, in abrogation of these decrees, a new one was passed by which the property of foreign diplomatic representatives accredited to the Government of the R. S. F. S. R., imported for the personal use of the heads of diplomatic missions, was exempt from customs duties if such duties amounted to not more than 20,000 gold rubles per annum for the head of each diplomatic mission. After the formation of the union, the Customs Code of the U. S. S. R. of 1925 left the promulgation of laws on the subject to the People's Commissariat for Foreign Affairs and OGPU. The Customs Code of 1928 did likewise, but no changes of the above rules are yet found in the Soviet records.

The rules regarding diplomatic mail are found in the same decrees of 1921 and 1922. The former limited the diplomatic mail to sixteen kilograms for each diplomatic mission, expedition of the mail being allowed twice weekly, thus making the total weight thirty-two kilograms a week. The decree of May 21, 1922, limited the expedition of mail to once a week, thus reducing the mail to only sixteen kilograms a week. Whatever the reasons, these decrees are considered by many as by no means conforming with the general principles of diplomatic privileges, which recognize no such limitations.

The last feature to be mentioned in this connection is the political character of Soviet consular functions. To quote Article 40 of the Soviet Statute of 1926 on Consular Service:

> The consul must see to it that the citizens of the Union of Soviet Socialist Republics who are abroad either in a private capacity or in the performance of their duties for Soviet state organs, institutions or organizations, as enumerated in Article 39, carry out all his legitimate orders. In case of insubordination to such orders of the consul the latter is to notify the People's Commissariat for Foreign Affairs in order that the necessary measures may be taken.[7]

[7] *Sobr. Zak. i Rasp. S. S. S. R.*, 1926, p. 126.

When applied in practice this provision means that Soviet citizens are required to follow any political advice the consuls may deem necessary to convey. This indication of the political rôle of the Soviet consuls abroad warrants a further conclusion: the general report on political conditions required of Soviet consuls includes also information which has a peculiar interest for the Soviets, such as that regarding the development of socialistic or revolutionary movements, or any information which may serve the realization of the ultimate political aims of the Communist Government of the Soviet Union. It is interesting to note, furthermore, that although the statute of 1926 provides that consular duties include the protection of the economic and legal interests of the Soviet Union, the consular conventions entered into by the Union mention only the economic and legal interests of Soviet citizens and not those of the Soviet State. The explanation evidently is that such functions, when performed in the interests of the state, become purely political, and as such are not germane to other consular functions, which by most countries are understood as applying to interests of citizens primarily.

To summarize, whatever the benefit or value of the novel Soviet contributions to international law on diplomacy and consular service, the classical *jus legationis* is considered by the Soviets as a basic prerogative of sovereign states only. The rules regulating foreign relations are embodied both in national legislation and international agreements in the classical tradition, the distinction between the diplomatic and consular services being likewise fully admitted by the Soviets.

The Soviet approach to the problems of treaties calls for little comment. In the technique of treaty-making the Soviets follow in every detail the general international practice, be it appointment of duly authorized agents, form of the treaty, language provisions, ratification clauses, or publication of the texts of the treaties. Adhering formally to the ancient doctrine *pacta sunt servanda*, the Soviets admit openly their preference for bipartite agreements; this, however (provided that there is no infringement upon the political or economic aspects of the Soviet plans), being no obstacle to their becoming a party to multipartite agreements. The subjects dealt with are the same and as varied as those found in treaties between non-communist states. Politically and economically, they may be divided into three groups: those concluded with Western European Powers and Japan, the treaties with the Baltic States, Finland and Poland, and the treaties with the countries in the Near East. Differing from each other in the degree of political aggression, as well as in the degree of economic benefits, the Soviet treaties are but an exposition of Soviet flexibility, ranging from the political *modus vivendi* and the most-favored-nation clause when dealing with their antagonists, to political protectionism and unprecedented economic favoritism when dealing with the weaker countries in the Near East. Even a brief analysis of the Soviet treaty practice readily justifies the conclusion that, for a non-communist, the Soviet treaties may serve as evidence that for practical reasons the Soviets cannot

yet disregard either the traditional technique of their making or the variety of subjects covered therein; while for those favoring the communist régime it may well be used as a means of defense against the accusations charging the Soviets with revolutionary aspirations, which are quite different from the political persuasions of other states.

Before proceeding with the Soviet attitude towards the rules of international law on war, a few words are proper in regard to international controversies and their settlement in general.

The analysis of the Soviet practice in this respect may be broadly reduced to that of prevention of international disputes and their settlement. In regard to the former, in brief it may be said that while the League of Nations does not list the Soviet Union among its members, the international organizations of a technical rather than political nature have received the hearty cooperation of the Soviets, even though sponsored by the League. Such are the Universal Postal Union, the International Red Cross, and the Health Commission of the League of Nations. The methods for the settlement of international disputes are usually classified as amicable and non-amicable. Of the former, diplomatic negotiations, good offices, and mediation have been resorted to by the Soviets; while there is no record in regard to commissions of inquiry, the principle of arbitration is acceptable to the Soviets, but only in "controversies which are either technical in their nature, or which involve private rights."[8] Arbitration involving cases of political conflict is not acceptable to the Soviets, hence also their opposition to the Permanent Court of Arbitration and the Permanent Court of International Justice. Retortion, reprisals, embargo, and boycott have been resorted to by the Soviets, manifesting thus their acceptance of these principles of non-amicable settlement of international disputes. While their attitude toward pacific blockade is not conclusive, the theory regarding intervention, advanced as early as Grotius, that intervention was not illegal when undertaken for the purpose of liberating masses from tyranny, is perfectly acceptable to the Soviets, provided that their specific interpretation of this purpose is viewed as not unjust.

War, for the communist, is nothing but a continuation of the political relationship by the use of different means.[9] This acceptance of the Clausewitz definition of war by the Soviets was sanctioned by Lenin when he said that "war is continuation of the same policies by using *forcible means*."[10] It is not surprising that the flexibility of this definition of war was duly appreciated by the communists. It was admirably adapted to their logical necessities. It permitted aggressive war to appear in the guise of an instigation to self-determination, or, at worst, as an armed class intervention—a mere extension of the class conflict beyond the confines of the U. S. S. R. The toiling masses having gained the victory at home, are only assisting the proletariat

[8] Korovin, *Sovremennoe Mezhdunarodnoe Pravo*, p. 137.
[9] von Clausewitz, *Von Kriege*, p. 28.
[10] Lenin, Works, XVIII, p. 97.

of another country. War is thus an integral part of the Marxian state politics, which *ex principio* are not interrupted thereby. Politics for a communist are focused upon class differentiation, which in its turn is the genesis of the struggle between the classes. And this struggle is the state itself. So war becomes but an extension of the domestic policies of the dominating class.

In reviewing the application by the Soviets of the laws of war, in brief it may be said that the requirement of a declaration of war would not be overlooked by the Soviets; the Soviet protest to Poland of May 2, 1918, stating that Vilna was occupied by Polish troops without any previous declaration of war being clear evidence of this claim. The next problem connected with war, namely, that of the area where the belligerents carry on their military operations, theoretically should involve no distinction for the Soviets between the technical division of the area into the "region of war" and the "theater of war." However, the difficult international position of the Soviets requires that the distinction be not yet abandoned by them.

The status of individuals and the treatment accorded them by the enemy state is for the communists a problem closely connected with the rôle of the class. While the traditional distinction between combatants and non-combatants has become to a certain degree pointless for the non-communist, for communists this differentiation is definitely immaterial, because for them there should be only two categories of persons engaged in war—the proletarians and their alleged oppressors. Likewise, the import of the class distinction would logically influence their attitude toward the problem of war prisoners, the class allegiance of the persons taken into captivity determining their status. The problems relative to civilian prisoners, hostages, and spies are likewise subject to the same consideration. Yet the practice of the Soviets in regard to the problems connected with persons, limited as it is, shows the readiness of the Soviets to compromise, temporarily at least, with the attitude of the other states on the matter. The same is true in regard to the treatment of the sick and wounded; the adherence of the Soviets to the Geneva Conventions of 1906 and 1929 without reservation is convincing proof that, at least formally, they wish to be considered as sharing the views of other states in this matter. The decree of June 4, 1918, by which the Soviets acceded to all the International Red Cross Conventions, and their protests during the Soviet–Polish war of 1920 against the mistreatment of medical personnel, is further evidence of the above.

There is little to be said in regard to the Soviet approach to the rules governing the actual conduct of hostilities. It is true that the uncompromising nature of the class struggle, which is the essential of war for a communist state, suggests that the principle of *animus belligerendi* would give way to *animus furandi* at the expense of the Hague rules, yet the accession of the Soviets to the conventions relative to persons in war warrants the assumption that, at least until a favorable outcome of the war is certain, the general practice of other states in this respect will not be disregarded by the Soviets,

in spite of their not having acceded to the Hague Convention of 1907 with respect to the Customs of War on Land. The fact that the Soviets are a party to the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare needs no further comment. The attitude of the Soviets toward aerial warfare may be best summarized in paraphrasing the statement of Egor'ev, who says that international law on air warfare is nothing but a "legalized sanction to complete freedom in action, and horrifying brutality in the guise of philanthropic intentions."[11]

Brief mention is proper in regard to the introduction of a new method of warfare, namely, socialist propaganda, purposing to bring the war to a victorious end as quickly as possible, sparing thus the lives of the enemy soldiers so needed for furthering the proletarian cause. New in principle, this method is justly considered by the Soviets as not a violation of international law, for there are no rules of war known in relation to this issue. Furthermore, the Hague Regulations prohibiting the compulsion of "the nationals of the hostile party to take part in the operations of war directed against their own country. . . ."[12] is not applicable here. For it is compulsion which is prohibited, whereas the effect of propaganda manifests itself in a free decision of those who voluntarily accept the ideas sponsored by such propaganda.

The Soviet legal material on naval warfare is so limited as to offer no facilities for the study of the Soviet attitude toward the problems connected therewith. Accession to the Hague Regulations concerning hospital ships and to the Hague Convention of 1907 for the Adaptation to Naval War of the Principles of the Geneva Convention of 1906 suggests the conclusion that in general the Soviets would follow the principles adopted by other states, due allowance being made for the effect of the class complex, as in case of land warfare.

To conclude this study of the Soviet attitude toward war, it is only necessary to remark three things. Bolshevism, politically materialized in the Soviet Union, having accepted the Marxian theory of the state as class-war, and being moved by a profound faith in the unquestionable righteousness of its cause—world revolution—is consistent in regarding war as a continuation of current policies by new, forcible means. Indeed, for the Soviets, wars in the future will be at bottom nothing but open collisions between the economic factors of production and the political factor of states. This means that the real objective of war for the Soviets is the destruction of the other protagonist class, brought about either by the breakdown of the capitalist economic centers and the substitution of a universal world economy in its stead, or by the forcible submission of non-proletarian elements to the will of the proletariat. Attributing *ex principio* no special worth to human individuals as such, the Soviets conceive of violence as sanctified by the use to which it is put. Hence,

[11] Egor'ev, *"Pravo Vozdushnoi Voiny," Voprosy Vozdushnogo Prava*, I, p. 126.
[12] Art. 23, IV Hague Convention, 1907, (Brit. For. & State Papers, C, p. 354.).

despite a formal adherence to humanitarian principles, evidenced by accession to certain internal conventions, the Soviets appraise the value of rules regulating the conduct of warfare in the light of entirely new motives. At the same time, they never lose sight of the political necessity of temporary adjustment to the views of foreign states dictated by the broader interests of the proletariat.

In evaluating the Soviet experiment in the field of international law, it is evident that since the non-communist states, although making no concessions to communist political theories, have nevertheless not excluded the Soviets from international intercourse; the Soviet Government has found a method of compromise between the metaphysical abstraction and the concrete political necessities with which it is confronted. This compromise is effected by transfusing the fundamental principles of international law with a communistic interpretation, while leaving their practical application to the dictates of political opportunism.

Thus the state—for the communists a struggle of classes—is acknowledged by Soviet diplomacy to possess most of the characteristics of the non-communist state. Sovereignty—for communists a phenomenon quite distinct from that of the non-communists—in Soviet practice carries with it all the rights inherent in the conservative conception. Persons—for communists theoretically a disindividualized unit of a class, ultimately to have no political nationality—in Soviet practice are definitely individual bearers of political allegiance and of all the rights and duties resulting therefrom. Diplomatic agents—theoretically equal—in practice are accorded the rights and courtesies of the most conservative states. Treaties—theoretically instruments implying the equality of the contracting parties—in Soviet practice (as in that of other countries) are submissive when concluded with a stronger nation, dominating when the other state is weaker, equal only where the equilibrium of strength necessitates it. The resort to amicable means for the settlement of international disputes—adopted, according to communist theory, for controversies among capitalist states, but impossible for the Soviets because of the prejudice against them—in Soviet practice is actually provided for in the texts of treaties and diplomatic notes. War—an object of persistent condemnation by the communists, formally pacifists *par excellence*—appears in the practice of the Soviets as another means to the same end sought by peaceful diplomacy.

This inconsistency between communist theories and Soviet practice is, however, not a just ground for criticizing the Soviet régime for not having contributed more to the practical development of international law. Whereas the difficulties of Marx were of a purely dialectic nature, those of the Soviets are chiefly pragmatic. They throw into relief the different relation between legal theory and practice in national and international fields. For, whereas in the national life of states theories may at any moment be translated into rules of conduct, in international life novel legal theories must reckon with

established principles. Here, a new theory can become law only after the sanction of the majority of states to the change has been secured. It is in the demonstration of this difference that one value of the Soviet experiment with international law lies. More concrete values are as yet hard to find, for the ideal classless commonwealth is far from materialization, and communist international law has had an opportunity to develop only under the régime of the Dictatorship of the Proletariat, a revolutionary authority resting directly on violence and absolutely unlimited by laws or rules. Hence it cannot be determined whether the communist interpretation of international law, if universally adopted and applied, would present improvements over the present system. However, the transfusion of the system of international law with Marxian theories is an unprecedented attempt, credit for which must go to the Soviets.

Whatever the practical or theoretical value of this study, it serves to emphasize the fundamentally different conceptions of international law held by non-communists and communists. While for non-communists the importance of international law lies not only in its external and technical forms, but in its spirit and in the purpose for which it exists, for communists, significant in international law is its essential theoretical superfluousness. Their practical application of its tenets is nothing but a diplomatic way of attempting gradually to remove international law—for them an outstanding obstacle—from the path of their revolutionary advance towards the classless commonwealth, purposing to place it ultimately "along with the spinning wheel and bronze axe, in the museum of antiquities."

The PRESIDENT. We are very much obliged to the two gentlemen who have read the papers this afternoon. They have been very informative, and in behalf of the meeting I wish to congratulate them. I am asking Mr. Brown to preside for the balance of this session as I have to withdraw to attend to some matters concerning the American Society of International Law. Before leaving, I would like to say that Dr. A. N. Sack, of New York University, will lead the discussion.

Professor A. N. SACK. Ladies and gentlemen: First of all, I would like to say a few words about the able paper of Mr. Taracouzio. He said something about the treaties the Baltic Republics made with the Soviet Union. He mentioned them with reference to the question of the succession of public debts of the old Russian Empire. I did not quite understand what he meant to say, and therefore, to be on the safe side, I would like to point out that these treaties of the Soviet Union with the Baltic Republics were not based on any denial of the principle of succession. These treaties provided that in consideration of something, whatever it was, the Soviet Union agrees, although I do not remember exactly what was said, whether the Soviet Union agrees not to claim from them the participation in the burdens of the Russian debt, or perhaps the Soviet Union liberates them from these burdens; in any case, such

provisions mean that neither one nor the other party to these treaties did consider that participation in these burdens is not their respective legal duty.

With reference to the title of the paper which Mr. Taracouzio read, may I suggest that he gave an excellent exposition of the different practices of the Soviet Union in matters of interest to international lawyers, but I would like to say a few words about the subject of the title of his paper, namely, about the effect, if any, of applied communism upon the principles of international law.

The question of the effect, if any, of "applied" communism on the principles of international law seems to me to involve the consideration of the following points:

(1) What effect, if any, has the fact of existence in the present world, of the Socialistic Soviet Union?

(2) What effect, if any, has the fact of recognition of this state by practically all the other nations of the world?

(3) Do the Soviets recognize the existing rules of international law as binding on them in their intercourse with other nations?

(4) If not, and if they have adopted any new principles for their relations with the rest of the world, did the other nations acquiesce in such new principles?

So far as the first point is concerned, I submit that the sole fact of existence, in the present world, of one socialistic state, with a philosophy and economic régime of its own, does not, by itself and alone, affect any of the existing principles of international law. International law leaves every sovereign nation free to regulate its own domestic affairs in its own way. It is concerned not with the social and economic régimes of individual states, which are different in Switzerland and Abyssinia, Great Britain and Persia, Belgium and Siam, but with the rules of intercourse between these different nations.

I further submit that the fact of recognition of the Soviet Union by other nations of the world again does not, by itself and alone, affect any of the existing principles of international law. Germany and France, China and Japan, Czarist Russia and the United States, always had different political philosophies. International law is not concerned with these different philosophies of individual states, and the fact of intercourse between them does not mean that one or the other of the states adopts the philosophy or acquiesces to the practices of the other. Sir William Scott, in *The Helena* (1801), 4 Robinson 3, held that the Algerines are not pirates, but states, because, he said: "We have regular treaties, acknowledging and confirming to them the relations of legal states." But it was never supposed that, by having entered into relations with the Barbarians of Africa, Great Britain acquiesced to their practices, so far as the same were violative of international law.

Of course, the Soviets have not abandoned the theory of the imminence of a world revolution. This belongs, however, to the field of philosophy, with which, I again submit, international law is not concerned, as it was not con-

cerned with the political philosophy of Mohammedanism in 1856 when Turkey was admitted to the privileges of the European concert. The practical question is only that of propaganda abroad. In this respect it should be recalled that the Soviet régime was born during the World War, and that the Soviets for several years had to fight for their existence against their domestic, as well as foreign, enemies. Amongst other means of warfare they used that of propaganda.

But there is nothing especially novel in the fact of international propaganda. So far as revolutionary propaganda in time of war is concerned, the armies of the French Convention used that weapon in their campaign against the European coalition. Great Britain, in 1803, tried to organize armed forces of French Royalists, and Prussia, in 1866, those of Hungarian revolutionists. During the World War the Allies plotted among the oppressed nationalities in Germany, Austria-Hungary and Turkey, and so also did the Central Powers in Ireland and India.

The anti-Bolshevist forces collapsed only in 1920. Then, in March, 1921, a trade agreement was made with Great Britain, and peaceful relations were gradually established with the neighboring nations as well as with some of the larger Powers. *De jure* recognition was extended to the Soviets by the principal European nations only in 1924.

Afterwards the situation gradually changed. Now the Soviets seem to concentrate on the task of building up socialism in Russia. They appear to desire peace. They undoubtedly are greatly interested in establishing and maintaining friendly relations with those countries with which they can profitably do business, commercial and financial. The result is that one now hears much less about propaganda.

Some say, however, that the Soviets may eventually violate their solemn pledges to abstain from propaganda. But treaties were not seldom violated by different nations before. Cicero defined a regular enemy as one who pays some regard to treaties of peace and alliance. Bynkershoek, in 1737, said that the Barbarians of Africa are not pirates, but states, because, he said, they pay the same regard to treaties that other nations do, who, he said, generally attend more to their convenience than to their engagements.

I submit that the principles of international law are not affected by the fact that some states may eventually violate their international law duties. Again, international law is not concerned with what individual rulers of governments may think international law should be, but only with the question whether the given nation recognizes that given rules are actually considered by the community of nations as binding on all states in their intercourse one with another.

What about repudiation of debts and confiscation of property? It is true that Germany and the Soviets, in the Treaty of Rapallo of 1922, made a clean slate of their *mutual* claims. But this was done for special practical reasons which have nothing to do with the existing principles of international

law. Nations of the world, which entered into relations with the Soviets, have never acquiesced in the repudiations or confiscations of the time of the War Communism, nor have they ever agreed, explicitly or implicitly, to acquiesce in eventual repudiations or confiscations in the future.

Aliens in Russia are, of course, subject to the Soviet law. But the existing principles of international law are precisely to the effect that aliens voluntarily entering a country implicitly agree to abide by, and are subject to, the existing laws of that country. No nation in the world has ever agreed, explicitly or otherwise, that its nationals could be now deprived, in Soviet Russia, of their life, liberty, or property, in violation of the existing principles of international law.

Of course, international law, as any social phenomenon, is subject to constant, though gradual and slow, evolution and transformation. The Soviet Union is a very important factor in the present international situation. But I submit that it is, to say the least, premature to speak now of the "effects of applied communism on the principles of international law."

Mr. PHILIP MARSHALL BROWN (Presiding). If the Chair may be permitted a word at this juncture, he recalls a function in a European capital not long ago, an international gathering attended by the diplomatic corps, when he had occasion to converse with the representative of the Soviet Union. I said to him, "It would be interesting to know what your theory and impressions of international law are." He replied in this enigmatic way: "I think it would be better if we all had one system." The question before us is, what system of international law is now being applied? As far as it concerns the Soviet Union in its relations with other nations, I think you will agree with me that we are fortunate this afternoon in hearing this new topic presented in a masterful way, and now, with the issue so clearly drawn, as Mr. Sack has done, I trust that our discussion may elucidate some of the points that have been presented. I hope those who take part will confine themselves, as far as possible, to specific issues, and that the discussion may move along rapidly.

Mr. ERNST H. FEILCHENFELD. I think I am in substantial agreement with Mr. Sack and Mr. Taracouzio that the decrees of the Soviet State did not bring about a change in international law. It seems to me in this problem four stages ought to be distinguished. In most of the stages, the legal effects are less fundamental than has been argued. A non-capitalistic state is set up which confiscates private property. Of course, as has been pointed out before, rules of international law in existence for the protection of private property do not disappear. While opinions may differ as to the effect of such action on international law, the fact remains that international commerce is based on confidence. Again, the confiscation of American property in Russia makes Russia, as a nation, wealthier, and makes America, as a nation, poorer, additional facts which cannot be overlooked in any system of international law.

A second approach is from the point of view that such a state has a dif-

ferent system of government, and is free from obligations because a new government need not respect rights acquired under its predecessor. Can such a state declare that it is no longer a member of the family of nations and that it is outside the field of international law? Such a declaration is possible; but it seems clear that mere secession would not exonerate any state from its obligations. Moreover, the much more interesting question arises as to whether, after the secession, the new international law advocated would be different from existing international law. I submit that three main principles are likely to survive: first, one state's territory is not the other state's territory; secondly, promises shall be kept; and, thirdly, ambassadors and ministers shall not be molested.

Then, we come to a second stage. After such a state has been created, new rights have been acquired; the same rules of international law will protect them as before. There are many states today under whose constitutions we ought to ascertain what rights are protected rights or what are precarious, subject from the outset to subsequent confiscation. Peculiarly enough, as commerce increases, we may witness the growth of a system resembling capitulations where the rights of foreigners are not merely protected, but are substantially different from those of nationals. In a third stage there would be a difficult situation in the relations between two socialistic states. In this situation, I submit the protection of property will be stronger, not weaker, because whatever foreign property there is in the other state will be the property of the state and not the property of some individual. As Mr. Taracouzio has indicated, we may envisage a fourth stage of world communism, under which international law would disappear, not because of socialism, but because a world state has been created. I submit that even then it might be worth while to preserve some of the rules of international law for the emergencies of secession and civil war.

Mr. MAX J. KOHLER. I would be glad if Mr. Bouvé would supplement his interesting paper by telling us if the German-Soviet Treaty he has referred to is accessible in English translation, and if so, where. If not, where the German text can be readily consulted.

While I am on my feet, may I say that Mr. Bouvé's clear analysis of the commercial arbitration clauses of these Soviet treaties reminds me of an interesting and important recent decision of about three years ago of our New York Court of Appeals, sustaining the validity of such international arbitrations [At the suggestion of the presiding officer, Mr. Kohler submitted the exact citation later on; it is Gilbert *v.* Burnstine, 255 N. Y. 348, decided in 1931, and also reported more fully, with a note summarizing similar cases in other jurisdictions, in 73 American Law Reports, 1453–1464]. In that case, Judge O'Brien rendered a unanimous opinion for the New York Court of Appeals, Judge Cardozo being one of the concurring judges. The complaint, which was sustained in this opinion, alleged that the plaintiff, a British resident and subject, made a contract in writing in New York with defendants,

residents and citizens of New York, for the sale of certain goods; the agreement contained a clause providing that any differences that might arise thereunder were to be arbitrated at London, pursuant to the British Arbitration Act. This was admitted in the answer, but the complaint contained the following further allegations, which were largely denied in the answer. These averments were that differences arose as to alleged nonperformance, and plaintiff served notice of arbitration upon defendants at New York requesting them to concur in an appointment of a sole arbitrator, and on default plaintiff would apply to the High Court of Justice of England for such appointment, under the English Arbitration Act of 1889. On defendants' failure to comply, the King's Bench Division of England issued a so-called "originating summons," which was served on defendants in New York, directing them to appear at a specified time and place before a master in chambers, so that an arbitrator might be appointed. On defendants' failure to act, an arbitrator was appointed by the master and he served a notice on defendants in New York to produce all relevant documents at a specified time and place in London. They ignored this, and after the arbitrator had served a further peremptory notice on defendants, he conducted an arbitration at London and made an award of £46,000 against them. The complaint alleged that the proceeding was in accord with the English Act. Defendants in their answer claimed that the contract was against public policy, and that the notices served on them were void, and that the English court had acquired no jurisdiction over them in New York, largely by analogy to Pennoyer *v.* Neff, 95 U. S. 719, 735, holding that substitute service outside the jurisdiction was a nullity under the 14th Amendment in an ordinary suit *in personam.* The Court of Appeals held that the complaint stated a good cause of action, and on proof of the allegations, plaintiffs would be entitled to recover on the award.

Pennoyer *v.* Neff was distinguished, as the defendants had themselves contracted to submit to the English arbitration proceeding in London, and the old-time rule against ousting our own courts of jurisdiction was no longer in force, and such agreement was not void as against public policy.

May I also say something concerning our earlier commercial treaty with Russia, that of 1832, which we abrogated in 1911 because of Russia's alleged violations of it, and which treaty has not had a successor until now. I secured recently from Russia photostatic transcripts of the confidential memoranda submitted to the Czar between 1830 and 1832 by his ministers, in order to see whether they tended to sustain Russia's side of the controversy with us as to the construction of this treaty, which was waged for decades. My transcripts are, I believe, the only copies that have ever gone out of Russia, and I propose to file them with the Slavonic Department of the New York Public Library and permit the Congressional Library, Manuscripts Department, to make copies. The United States was represented in the negotiation of this treaty by our Minister to Russia, James Buchanan, and the official correspondence exchanged at the time of the negotiations between the two countries, and

Buchanan's instructions, were published years ago in John Bassett Moore's edition of Buchanan's *Works*. I have, however, been privileged to examine Russia's private memoranda, as just stated, and I may state unequivocally that none of the documents in the case lends the slightest support to the Russian contention that the treaty rights of Jewish holders of American passports were limited by Russia's own municipal restrictions upon the rights of her Jewish subjects. I was privileged to describe this controversy and the abrogation movement at some length in one of the American supplementary chapters of Luzzatti's *God in Freedom* a few years ago.

The CHAIRMAN. Will you answer the first question, Mr. Bouvé?

Mr. BOUVÉ. In answer to the first question, you will find an English translation of this treaty of October 12, 1925, in the League of Nations Treaty Series. The treaty is published in four languages, English, French, German and Russian. You will find a very able and exhaustive presentation of all the questions which came up in connection with the treaty, including a study of the various domestic law provisions of each country which it was necessary to go into in connection with the making of the treaty, in a volume entitled *The German-Russian Treaties of 1925* by Mersmann-Soest and Wohl. The work includes references to the German Memorial which I have mentioned in my address, and they are very conveniently arranged in that book. The German Memorial is the one which contains comments on many of the separate articles. In this arrangement the comments of the Memorial with respect to each article follow each article in each agreement, and they then are followed by a very able dissertation by the authors on both the Memorial and the articles of the treaties.

With respect to the other matter, what I was trying to do in my address was to explain the formation and constitution of courts of arbitration under the treaty of October 12, 1925—whether they were to sit or be constituted in one country or the other, or in a third country; and to point out how judgments were to be obtained and the conditions under which judgments were executed. My address was limited to a consideration of the points dealt with by the treaty. I made no attempt to go into the local laws on the subject.

The CHAIRMAN. Would any foreign judgment here be executed in Russia in accordance with international practice, if not contrary to the rule of public morals involved?

Mr. BOUVÉ. That I am not clear on, in the absence of treaty provisions.

Professor TARACOUZIO. With reference to the judgment in this country, general assistance would be rendered by the Soviet Government on the basis of treaty agreements. As far as I know, no such treaties exist between the U. S. S. R. and the United States. Therefore, the question of judicial assistance is rightly left to diplomatic considerations. As a general practice, judicial assistance by the Soviets is rendered on the basis of treaty agreements.

The CHAIRMAN. Even though the foreign judgment might be contrary to the Soviet philosophy?

Professor TARACOUZIO. The practice of the Soviets in general shows that political necessity sometimes dictates the determinant.

Mr. CHARLES WARREN. I would like to get information on one phase of international law which Professor Taracouzio omitted to discuss. He spoke of a number of subjects, including the subject of war. I would like information as to what effect the Soviet system has on the law of neutrality, in this respect: I can see that a belligerent might have the right to interfere with the trade of neutral citizens, but to what extent will the Soviet Government permit a belligerent to interfere with the private property of the Soviet Government? As I understand, all property is the property of the government and any trade is trade by the government. To what extent does the Soviet system contemplate the right of a belligerent to interfere with government property?

The CHAIRMAN. I wonder if either of the gentlemen can throw any light on that question.

Professor TARACOUZIO. If I understand the question, the Soviet trade representatives, as agents of the Soviet Government, may enter into commercial obligations and there is no provision which prevents a foreign government from serving a warrant against the property of the Soviet Government, except the property which belongs to the officers of the diplomatic mission or of the commercial representations, necessary for the expedition of their business. From this point of view we have another problem, namely, the attitude of the Soviet Government toward neutrality in general. I dare say that the Soviet Government fully understands what neutrality means; there are no two ways about it. Treaties of the Soviet Union have been concluded to the effect that the Soviets will recognize certain territories, particularly in the Gulf of Finland, to be neutralized. As far as concerns the Soviet objection to the confiscation of government property in case of war, I mean Soviet property being neutral, I personally think that I might ask what government would not object to the confiscation of property if it considers it as being neutral property? Declarations of neutrality in the last several years certainly have become intricate, and the manner of interpretation thereof is still left to the political department. I would say that the Soviets would object, provided the war is an imperialistic war. If the war is a revolutionary war, I am inclined to think that the Soviets would endorse the confiscation of such private property as a means of handing it over to the proletariat.

Mr. WARREN. That is an illuminating statement which raises an important practical question. Suppose a war breaks out between great Powers and Russian commerce is interfered with. If that is the commerce of private individuals, we will say, international law now recognizes the right of belligerents, under certain circumstances, to seize that private property. If, however, it is the property of the Soviet Government and the Soviet Government does not recognize the right of a belligerent to seize its property under any circumstances, then it seems to me that presents a very interesting phase of

international law which all nations will have to give careful consideration to. There are certain rights which the belligerents possess and certain rights which the neutrals possess, and if any plea should be made on any seizure of Russian Government property that it is a seizure in derogation of the rights of the Russian Government, then we would have to have a body of law relative to the rights of property owned by states having systems of government which the Soviet State possesses.

The CHAIRMAN. Mr. Warren has spoken of certain rights of belligerents and neutrals. I wonder if he wants to qualify it and say uncertain rights.

Professor QUINCY WRIGHT. I want to raise a question, suggested by Mr. Warren's statement. Possibly he already has his mind made up on this proposition. I believe during the World War, in 1915, there was a resolution in Congress with the object of the United States Government purchasing certain German vessels which were lying in American ports. That resolution was not passed by Congress; I believe the administration opposed it. I wonder whether Mr. Warren has an opinion as to what the United States Government would have done with respect to the protection of those vessels if that resolution had gone through and the United States had a fleet of government-owned vessels on the high seas engaged in ordinary merchant business. That seems to be a practical situation.

Mr. WARREN. It would have required the formulation of a new body of law on that subject. I am not prepared to say what I would have done. It would have presented the necessity of reconsideration of the law applicable to neutrality, when the property involved is the property of a nation.

Mr. GEORGE A. FINCH. As I gather from the discussion of the proposition, the case given by Mr. Wright is not the only question that would be involved. The question relates not only to property in the ship, but property in the cargo; the property involved would be the property of the Soviet Government.

Let us try to analyze what Mr. Warren means. The general rule is that the neutral has the right to carry on his commerce with the belligerents as before the war, subject to certain belligerent rights. One is that the belligerent can interfere with contraband of war. Do I take it that the Soviet Government would be engaged in carrying on contraband trade, as a government, with one of the belligerents? We all know the distinction between what a private neutral person can do in war and what the government can do. A private individual can trade in arms and ammunition with a belligerent without involving the neutrality of his government, subject only to the right to confiscate that property; but if his government engages in that trade, it is violating its neutrality and its act may be regarded as a belligerent act. I cite that only as an example of what would happen in the case where an attempt would be made by the belligerent to seize property for, say, violating a blockade. Would the Soviet Government attempt to violate a blockade? If it did, the

question of neutrality would disappear. If the United States Government should attempt to sell warships to belligerents, we know that would be a violation of its neutrality and might be regarded as an act of war, although private individuals could do the same thing without involving the government's neutral position. I think the question is not as complex as Mr. Warren's statement indicates. If the Soviet Government owns the property and attempts to carry on trade, as a government, or in the name of all of its people, and attempts to do any of these things in a war between other nations, I take it the question of its neutrality would disappear, as it would be taking part in the war as a belligerent.

Mr. THOMAS H. HEALY. I think this discussion brings up another question. Suppose Russia, instead of being a neutral, were a belligerent. I understand the general theory to be that you can confiscate the public property of an enemy. If all property in Russia belongs to the government, there does not seem to be any line you can draw between the property of the government and the property of private citizens, inasmuch as there is not any such thing as the property of private citizens in the complete sense of that term. I wonder what would happen, in case Japan started a war with Russia and went in and took not only what would be ordinarily considered as public property, but any and all property found, on the theory that it was all public property.

Mr. BOUVÉ. As a matter of fact, under the régime of the present Soviet Government, it is going too far to state that all property belongs to the government. There are certain undesignated classes of property which do belong to private individuals, so that, perhaps, in its entirety the problem just suggested might not be the exact situation.

Mr. WARREN. Is there any such class of property in which they could engage in foreign commerce?

Mr. BOUVÉ. I doubt that.

Professor WILLIAM I. HULL. It is rather indefinite as to just what would be considered private property.

Mr. BOUVÉ. It is provided that land, railroads, etc., can not be the subject of private ownership; lands, railroads, river and sea-going shipping, radio, telegraph, subsoil and all that. It takes about five sentences to designate what is public property, but there is a good deal of private property not touched. There are special provisions in the code characterizing certain objects as private property. What is not private is specifically designated in the code as public property.

The CHAIRMAN. The Chair would like to suggest that there is a larger question which has to receive separate attention as to the rights of publicly owned ships engaged in commerce and trade. That is another field that we have discussed, but which obviously needs a great deal more examination in the light of the specific problems raised this afternoon.

Mr. BENJAMIN AKZIN. Mr. Taracouzio has mentioned before that the

Soviet Government had proclaimed by decree the cancellation of all international obligations incurred by Russia under the Czarist régime. I should like to seek information concerning any claims advanced by the Soviet Government as to rights under Czarist treaties.

Professor TARACOUZIO. As I understand the question, it is whether the Soviet Government has renounced the Imperial treaties, or if they have claimed any rights under those treaties? Let us go back again to that troublesome area, into Manchuria and to the question of the Chinese Eastern Railroad. I think there is an illustration which calls for no comments. Then let us go right here in Washington, to the question of the property on 16th Street now occupied by the Embassy of the U.S.S.R.; also cases like the Black Tom case and others. I think there are a number of instances where this conflict between their decree of renunciation of Imperial Russian treaties and the practical benefits which they are seeking to derive, is quite evident. Although there is a conflict between the renunciation of treaties and the benefits which they would like to derive from their citations, the question of insisting upon their rights is left to the dictates of political expediency.

Mr. EDWARD DUMBAULD. The question which I would like answered is, suppose that Russia is a neutral and is carrying on foreign commerce which is not a violation of neutral duty. Then, is Russian commerce entitled to exactly the same privileges and immunities as private commerce, if carried on by the nationals of other states? It seems to me that is the question which we have been trying to raise.

The CHAIRMAN. Has anyone any answer to Mr. Dumbauld's point?

Professor QUINCY WRIGHT. I can not give an answer, but there is another point I want to speak on if nobody wants to answer Mr. Dumbauld.

Mr. FINCH. As I understood Mr. Dumbauld, he is trying to get an answer covering that vague class of property which Mr. Bouvé referred to as private property in Soviet Russia. In the absence of any specification of what that property is, I do not think we can answer the question.

Professor QUINCY WRIGHT. The problem I want to call attention to is the question of what tendencies in the field of international law may be expected for a long time in the future from the existence of the Soviet Government. I agree entirely with what Mr. Sack said as to the juridical significance of the existence of a single Soviet State and its general recognition. Nevertheless, I think the discussion we have had since indicates that serious problems will be raised through the fact that one state does not maintain the distinction which has been recognized for the last few centuries, between public activities and private activities of an economic nature. These are conditions which can not but have a modifying effect on behavior in the future. One might suppose that these tendencies would lead to a diminution of the importance of territorial boundaries; that the Soviet Government would attempt to propagandize abroad and to minimize the significance of political boundaries in its insistence upon the world solidarity of the proletariat; that its govern-

ment monopoly of international trade would bring about a penetration of government rights of one state into the territory of another.

It seems to me that the tendency is likely to be contrary; that the existence of the Soviet State may tend to augment the significance of territorial sovereignty and reciprocally to diminish the rights of nationals in foreign territory, or even of government agencies in foreign territory.

Take, for instance, the question of the status of publicly owned vessels in private business. American courts and British courts are committed to the principle that a publicly owned vessel even though engaged in private trade for profit, is a public vessel. There has been a tendency for the courts to break that principle down in the United States, but even more in European countries. The Brussels Congress of 1826 agreed on a rule assimilating publicly owned trading vessels to private vessels. The existence of the Soviet Government may have been an important reason for this tendency.

I should be inclined to suppose that international law would tend to the view that only those agencies engaged in direct diplomatic or political activity when abroad would be entitled to the status of public character. Instrumentalities engaged in commercial business, even though publicly owned, would probably not enjoy those immunities. While in a certain sense one might say that the commercial agencies that are attached to the Russian embassies should partake of all the immunities of a diplomatic character, I believe that in the treaties they have not been entitled to such immunities. The distinction has developed between the agencies engaged directly in diplomatic activities which enjoy immunity and others which do not.

Possibly the protection which aliens abroad are entitled to under international law will tend to decline. It seems unlikely that the Soviet Government will be willing, in its program of general economic planning, to allow private concerns to operate and to enjoy within its territory the rights which have been to some extent established in treaties and by international law among capitalistic countries. If the Soviets are going to carry on the experiment within their territory, they will have to have absolute control of the economic life within their territory; they can not tolerate economic freedom on the part of foreigners who may come in.

I think we have some evidence of this tendency to augment the significance of territorial sovereignty through the non-aggression agreements which Russia has made. The Litvinoff Treaty of last summer places an absolute bar upon the passage of military forces across frontiers for any purpose whatever. This treaty provides that even if a neighboring country carries on propaganda activity subversive to another state, there is no excuse for military intervention across the frontier. In this treaty we have the theory of absolute territorial sovereignty, and the complete denial of any right to intervene across frontiers for any purpose. So, while it might seem contrary to immediate expectations, I should be inclined to say that the long run effect of the existence of the communistic state may be to augment the absoluteness of the

sovereignty of a government within its own territory, and to diminish the rights it has with respect to the protection of its nationals or other interests within foreign territory.

Mr. ALFRED M. STUMER. The discussion about the immunity of public vessels engaged in private service seems to be somewhat antedated. From the World War we may draw two excellent examples of public vessels engaged in public service, between the motherland and her colonies, whose legal prerogatives were completely ignored by one of the belligerents.

The first was the case of Holland. By the spring of 1918 all communications had stopped between Holland and Netherlands India, and the Dutch Government found it necessary to make up an armed convoy. When this was broached to the British Admiralty permission was refused, until the Dutch Government submitted a complete list of passengers and cargo to the British Legation at The Hague. Not until this list was several times revised, and finally approved, was the fleet permitted to sail.

The second instance is the case of the Danish Government's attempts to maintain direct communication between Copenhagen and Iceland, which was at that time a Danish colony. The British Government stipulated that before any ship could sail a detailed list was to be submitted to the British Legation for approval. Should these demands not be complied with, the vessels would be taken into Kirkwall, and searched, as any private boat engaged in purely commercial transactions.

Today, it is apparent, hostilities may be resorted to without legally involving the nation in warfare; therefore, it seems to me, that we have the possibility of reverting to the 17th and 18th century doctrine of armed convoys at sea, which, if they meet a belligerent war vessel, defend themselves as best they can. Otherwise it will be necessary to discard the doctrine of neutrality entirely, and work out a completely new system. As a final alternative, we can permit our vessels, on the high seas, to be seized by the belligerents and ignore the seizure. Under any other conditions we will find ourselves in a rather difficult situation defending our neutral rights.

Mr. FEILCHENFELD. May I comment on Mr. Wright's statement? Mr. Wright believes that the protection of aliens under the communistic system is likely to become weaker. That may be true in fact, but I am not sure it will be true in law. It is true that, under the communistic system, it is difficult to acquire certain private rights, but the question still remains open whether the protection does not remain the same for the greater or smaller number of rights which the Soviet Government permits aliens to acquire. Take a very recent problem, the protection of bonds floated by the Soviet Government. The Soviet Government so far has maintained that these rights are protected as much as any others. I would like to know from Mr. Taracouzio to what extent these statements are unfounded, or to what extent they have a basis in the present system of Soviet private or public law.

Professor TARACOUZIO. The question is, to what extent civil rights are

based on the Soviet law? If I recall correctly, I think it is Article I of the Civil Code which says that civil rights are protected in so far as the activities of persons do not conflict with the Soviet system. I do not recall the wording of the provision, but such rights are guaranteed, I believe, in this Article I of the Civil Code, if that answers the question.

Mr. ALBERT LEVITT. In the Criminal Code of Russia there are also provisions which are to this effect—I will not attempt to quote them—that wherever you have a person accused of crime and there is some doubt as to how the decision should go, the problem should be resolved in such a way that only the Soviet method and the Soviet philosophy should be concerned, whatever may be the private individual rights of the person concerned.

The CHAIRMAN. Are there other speakers? This is a very good opportunity for us to get further information. I remember a discussion I had with Bela Kun, during the Bolshevik régime in Budapest. I asked him to define the terms "bourgeoisie" and "proletariat." He said a member of the proletariat was one who lived by his own efforts, and a member of the bourgeoisie was one who lived by the efforts of another. I asked where he would place me. He said, "You belong to the proletariat; you are a professor." I am not so sure that my position was quite safe. Are there any other questions?

Professor HULL. Mr. Taracouzio made a very brief reference to the continuity and succession of states, and I was left under the impression that treaties entered into by the Soviet Government are considered to be valid by "the people" of Russia only as relating to "the proletariat class" in each country. I wonder whether it would be possible for a treaty in the name of the people of Russia to be considered binding as with the bourgeois class of the other country. You may remember a few years ago, when the Kellogg Pact was being discussed in Japan, the ratification of that treaty was held up for some time on the theory that it was made in the name of the people of the various countries, and in Japan treaties are made only in the name of the Emperor. In Russia, is it true that treaties are made in the name of the proletariat and that they are really binding only as between the proletariat of that country and the proletariat of the other country?

Professor TARACOUZIO. If I understand correctly, the question is, in whose names are the Soviet treaties made? At the very beginning, there was complete chaos in the names on whose behalf treaties were made. We find treaties naming Commissars, People's Commissars, Soviet Republic, Council of Commissars, Russia. Gradually those names have disappeared and the treaties are made in the name of the Government of the Union of Socialist Soviet Republics. As far as the mention of proletariat and non-proletariat is concerned, in my studies I have found only one instance of distinction between the proletarian and non-proletarian classes, and that was the treaty of 1921 with Hungary. Reading of the Soviet treaties did not reveal to me that emphasis has been laid on the fact that the Soviet treaties are binding only upon

the proletariat and not upon the bourgeois class. As regards the problem of what benefits the so-called bourgeoisie could derive from the treaties with foreign states, irrespective of one's attitude towards the Soviet régime, I think it is only just to say that in point of law a bourgeois may claim the same benefits as have been guaranteed for the proletariat, and then it is up to the authorities to decide whether he deserves those benefits or not.

Mr. DUMBAULD. I am quite sure that Mr. Taracouzio understood and answered the question which had been asked, but he did not answer the following questions: Is a treaty which provides rights for the benefit of non-proletariats who are nationals of other countries than Russia, binding on the Russian community? Is that clear? Suppose Russia makes a treaty with the United States and that this treaty provides certain rights for Americans, say officers, and the American officers are considered as not proletarian. Is that treaty considered binding by the Soviets?

Professor TARACOUZIO. I understand the question, but wish to suggest that whatever the provisions of the treaty which the Soviet Government has entered into, we must remember that this is a transitional stage, which is the dictatorship of the proletariat, and whatever the dictatorship decrees, the proletariat *en masse* has nothing to say.

Mr. DUMBAULD. Does the dictatorship consider it is bound to perform its obligations for the benefit of an alien non-proletarian?

Professor TARACOUZIO. If it enters into such an agreement, evidently it considers it feasible for some reason or another, and therefore you may count that it considers itself bound.

Mr. BOUVÉ. Touching this point, it may be observed that while under the domestic law of Russia there are certain distinctions drawn with respect to the enjoyment of rights on a purely class basis, that issue, as far as I am able to observe from the treaties, has never been raised in any treaty whatsoever. I do not see how any capitalistic country would be in position to conclude any treaty in which this particular distinction, which has always been avoided, should ever be made an issue.

Mr. HEALY. I think that in all this discussion about Russia, we had better bear in mind that there is a peculiar situation there, whereby we have a government with a certain constitution and certain codes, and we have another organ known as the Communist Party, which, for all practical purposes, runs the government and which is not controlled by those constitutions or codes. Even the written law, subscribed to by the government, may not be the same thing as the law that will be applied in a given particular case, or in an emergency. The attitude of the Communist Party relative to the sanctity of treaties and agreements which they make is of record, and it does not square exactly with what is found in the written laws that the government subscribes to. As practical men and women, I think we had better bear that in mind.

Professor CHARLES E. HILL. Colonel Bouvé discussed the inheritance

provision in the Soviet-German Treaty. I should like to know to what extent inheritance is recognized by the Soviet law.

Mr. BOUVÉ. I can answer in this way, without posing as an expert in the matter. With respect to the property which was reserved to the state, the question of inheritance could not come up at all. With respect to other property, inheritance naturally did come up. Up to some time ago the Civil Code —Article 416 of the Civil Code of 1923 of the U. S. S. R.—placed a limitation upon estates to the effect that the value of the estate which could be inherited could not exceed ten thousand gold rubles, the rest reverting to the state. That is what I referred to in one part of my address. However, Article 416 was revoked, I believe, in 1926. To what extent inheritance can be enjoyed with respect to private property, whether such a limitation has been entirely removed or not, I am not prepared to say.

The CHAIRMAN. The time seems to have come to terminate this discussion, unless someone has something he wishes to offer. As far as I can summarize the discussion, it seems to be somewhat in this fashion: whereas in the Constitution of the United States it is stated that the law of nations is a part of the law of the land, we have no assurance that a similar situation exists in Russia.

May I call attention to the meeting tonight at 8 o'clock. The subject will be the protection of foreign bondholders, and the Securities Law of 1933. This subject will be presented by Mr. Huston Thompson, formerly Chairman of the Federal Trade Commission. We will also have a paper by Judge Manton on the reorganization and rehabilitation of governmental loans. The discussion will be led by Mr. George Nebolsine, of New York, and Mr. Edgar Turlington, of Washington. We will now adjourn until 8 o'clock this evening.

(Thereupon, at 4.30 o'clock p. m., the session adjourned to meet again at 8 o'clock p. m., Friday, April 27, 1934.)

## FOURTH SESSION

**Friday, April 27, 1934, 8 o'clock p. m.**

The session convened at 8 o'clock p. m., President JAMES BROWN SCOTT, presiding.

The PRESIDENT. Ladies and gentlemen: The program this evening is devoted to the protection of foreign bondholders, and the first speaker of the evening will be Mr. Huston Thompson, former Chairman of the Federal Trade Commission, who will speak on the Securities Law of 1933. Mr. Thompson—

## THE SECURITY LAW FOR THE PROTECTION OF FOREIGN BONDHOLDERS

By HUSTON THOMPSON

*Former Chairman, Federal Trade Commission*

At the outset permit me to say it is the purpose of this address to keep as far away from a technical discussion of the subject assigned to me as possible. Rather shall I approach it from an historical point of view and follow it with a personal attitude through the sector that I saw.

The movement which has culminated in the much discussed Securities Act of 1933 had its inception in the Wilson Administration and particularly in the Federal Trade Commission. That body had been legislated into existence in 1914, and shortly thereafter there began to be lodged with it complaints of the "blue sky" variety charging the selling of securities under false representations. The Commission acted upon these as it did with all other complaints in their regular order and without setting up any separate organization.

When we entered the war there was organized in Washington a body called the Capital Issues Committee which had some relation with the Federal Reserve Board. Under the dictatorial war-time control, which no one in that exigency questioned, the Capital Issues Committee passed on securities that it thought should be issued and discouraged those that it thought should not.

After the war the Capital Issues Committee determined to disband. It had gathered a great deal of valuable information on the subject of securities which it thought of decided value. Having learned that the Federal Trade Commission had set up a Blue Sky Division, it offered, and the Commission accepted, its files. At the same time this Capital Issues Committee, composed of a group of hard-headed business men, having been awakened to the tremendous losses suffered by the public through misrepresentation or no information of securities they purchased, formulated recommendations for the supervision of the sale of securities. These were sent to Congress, and a bill was drafted which was introduced by Congressman Taylor of Colorado

on December 2, 1918. The subject having been brought to President Wilson's attention, he recommended the passage of a Federal Securities Act on August 8, 1919.

In the meantime Senator Glass, having become Secretary of the Treasury, was attempting to put over the Victory Loan Bond issue, but was having great difficulty due to the fact that the country was in a highly speculative frame of mind. Government bonds had had a tremendous drop in price and there was a drive on to get discouraged persons to exchange them for "wild cat" and other speculative securities that were supposed to promise great profits. Eventually, when a crisis was reached, the Commission was approached by representatives of the Treasury Department at the instance of the Secretary and asked if the Commission could not set in motion an intensive campaign to handle this problem. The Commission's reply was that while its jurisdiction over securities had never been challenged, it had some doubts as to the extent of that jurisdiction, and if the Treasury Department could convince it that it had jurisdiction it would proceed much more actively. There followed the appearance of the Solicitor for the Treasury, and others, who presented briefs and argument which caused the Commission to decide that the crisis necessitated its going ahead and letting its jurisdiction be challenged in the courts, if necessary. From that time on the Commission became very active in the blue sky field. As the only lawyer on its membership at that time, I was assigned the duty of supervising this work.

It was not long before I discovered that while many millions of dollars were going into the purchase of Western wild-cat stocks, many more millions were being absorbed in securities both domestic and foreign of doubtful or over-capitalized value that were being sold over the exchanges or by investment houses that were considered reputable organizations. If we go back for a moment we will remember that in 1919 and the early part of 1920 there was an over-expanded movement in securities which culminated in a sudden collapse similar to, though not so severe as, that which occurred in the securities market in 1929.

When the Taylor Bill was before the Judiciary Committee of the House of Representatives, the members of the Commission were invited to appear and express their views. This bill, which was very much milder in form and substance than the Securities Act, and exempted the sales of securities made by recognized investment houses, was met with a savage attack by the investment bankers just as has been visited upon the Securities Act of 1933. When I insisted that the sales of investment houses should not be exempted they became alarmed and saw to it that the bill never got out of committee. They used the same tactics, argument and propaganda before the Congressional Committees then as were used against the Act of 1933, and are now being used against the Stock Exchange Bill. They said they were seeking the perfect bill and therefore wanted to amend the Act of 1933. Their language in opposition to the Taylor Bill was so similar to that put forth at the hearings

on the Securities Act that I called attention to this fact when the House Committee was considering the Securities Bill.

The subsequent developments in the methods of the sale of wild-cat securities and those of investment houses, all of which seem to be forgotten now in the propaganda against the present law, were often so scandalous and shocking and the results so terrible to the purchasing public that it was natural that note should be taken of it in the platform of the Democratic Party in 1932. Let us not forget that there were sold in the United States from 1919 to 1931 foreign and domestic securities of the value of approximately $50,000,000,000 to the purchasers, from which it is estimated there was a loss of $25,000,000,000.

The first draft of a platform covering this subject was negotiated at a conference in the University Club in the city of Washington by six men after a series of gatherings and discussions. All of those present were determined that there should be a plank covering the subject of the protection of the public in the sale of securities. Having had some experience in this line, I was asked to draft the plank. At the Chicago Convention there was complete unanimity for a program of protection to the investing public and the Washington draft was adopted without objection or change.

Shortly after March 4th there was initiated in the Department of Commerce under Secretary Roper a movement to draft a bill that would answer to the party pledge. A remarkable collection of material had been assembled by those in the Department when Secretary Roper asked me to supervise the drafting of the legislation. We had before us all of the Blue Sky laws of the States, the Uniform Sale of Securities Act as drafted by the commissioners of some thirty-seven States and as approved as to form and content by the American Bar Association, together with a great deal of data relating to the sale of foreign and domestic securities in the United States. We also had the laws of Great Britain, Belgium and other countries, and we had at hand *Other People's Money*, a volume written by Mr. Justice Brandeis from information gathered in the Pujo Financial Investigation in 1912. This book contained valuable information and recommendations as to legislation.

The first draft of the Securities Bill was designedly drawn along the lines of the Uniform Sale of Securities Act. Its language was clear and simple, and knowing that there would be an attack upon the proposed legislation, we deliberately planned to fortify ourselves with something which the lawyers, at least, could not attack as to form or substance. We sought to use this form as a framework in which we would incorporate, as far as possible, the suggestions of the British and Belgian laws, and those from Justice Brandeis' book.

Several dominating ideas claimed our attention at the outset and others evolved as we worked on the bill. We determined, if possible, that there should be no distinction in the obligations, under the proposed law, placed upon those selling domestic securities from those handling foreign securities.

While we appreciated the shock due to the loss in the value of securities, we thought only in terms of a statute that would protect the purchasing public in future transactions.

We proposed to place definite minimum requirements in the law covering information that would be required by the enforcing body and the substance of which would be conveyed briefly to the ultimate purchaser of a security, rather than prescribing a maximum requirement of information and giving the enforcing body the discretion to exclude through rules and regulations what it might deem unnecessary. The idea of requiring a minimum grew out of a rather long and intensive experience on a commission which had rather broad discretionary powers, which discretion placed a great burden upon its members. Discretion in a governmental position almost invariably opens the door either to the control of the enforcing body by those especially interested, or to propaganda and attack upon it by those who would control it and cannot. This is very discouraging to a public official and frequently weakens the affirmative action of a commission for which he may be giving his best services.

As the drafting of the bill progressed, it was first thought that the proposed law should be enforced by a commission representative of the State, Treasury and Commerce Departments. The proponents of this idea argued that all three of these departments were either directly or indirectly involved in the matter of the issuance or sale of domestic and foreign securities. We opposed this idea and suggested in its place that the Federal Trade Commission should be the enforcing body. Our reason for this was that administrations change because of political times and tides, and if there was to be a continuity of ruling and a logical building up of regulations and enforcement, the controlling body should be as far as possible independent of political changes and should have a continuing and permanent existence. When this idea was brought to the President for his consideration, it met with his ready approval.

The first draft reached the President March 17th and was submitted to the Attorney General for his consideration, and on the 19th there was a meeting at the White House for the purpose of discussing the bill, at which were present the Attorney General, Secretary Roper, and several others. At this hearing two questions were raised respecting the bill. One was that it was too long, which was readily agreed to, and the bill was subsequently cut down, although the draft that became a law was many pages longer. The other suggestion, which was more important, was that the bill as then drafted produced too direct a contact in the sale of foreign securities between the Federal Trade Commission and any foreign government that was proposing to place an issue in this country. It was thought that this might cause some complications with other governments, and therefore the President requested me to discover some other method of approach. This I did by placing the burden upon the investment house in this country that would offer such foreign gov-

ernment securities for sale, rather than putting the requirements upon the foreign government directly. With these changes the bill was introduced in both Houses simultaneously in order to speed its passage.

Prior to the meeting it was known that Senator Hiram Johnson had introduced several bills regarding the sale of foreign securities in which the Government was to be authorized to stop the sale under certain conditions. We were aware, of course, of the investigation made by the Committee on Finance of the Senate covering the flotation and allocation of foreign securities. The credit of this investigation and what it accomplished must go to Senator Hiram Johnson, who almost single-handed and with practically no expense developed before the committee an astounding condition in so far as the sale of certain foreign securities in this country was concerned. Following the investigation he also introduced a bill to aid those who had purchased foreign bonds in recovering part, at least, of their losses.

In order to acquaint Senator Johnson with what we were doing and to seek his assistance before introducing the bill, I called on him and showed him the bill that was about to be introduced. When he learned that we proposed to put all future issues in this country of domestic and foreign securities on the same basis and had read over the requirements of the bill, he expressed his complete satisfaction and said he would support it and would not push the bill which he had introduced looking to regulation. At this conference I asked him how, among all the various problems that were calling for relief and correction, he happened to become so interested in foreign securities. His reply was that in 1930 and 1931 his mail began to be overloaded with letters from individuals begging him to help them in their distress due to the loss of their life-savings through the purchase of foreign securities. This suggested the idea that he should consult his associates in the Senate. He did and found their mails were telling a similar story. The Senator then and there determined upon an investigation.

At first the Senate received his suggestion very indifferently. He was not even a member of the Committee on Finance to which such investigation would be assigned, but he was permitted to act in the capacity of investigator. When, however, the investigation got under way the revelations were such that it was not long until there was a practically unanimous desire on the part of the Senate to take some legislative action.

At the time of its introduction the Securities Bill was not considered as being in its final form, but it was believed to contain the essential requirements for protecting the public. It was expected that discussion before the committees would suggest some amendments. When the bill was before the House Committee many questions were raised as to whether the information required was of sufficient detail. It so happened that the chief counsel of the Federal Trade Commission, Judge Healy, had been developing a remarkable picture of the assets, write-ups, and methods of the sale of securities in the utility world. This investigation not only showed what information was

vitally necessary in valuing a security, but has been most effective in revealing the manipulations in the sale of securities that has ever been brought to light. The facts exposed the methods used and results obtained by the utility companies and have given the public the information with which today it is battling in the various States for a reduction in utility rates. It was because of his information that Judge Healy was called before the committee and gave many of the suggestions which are now contained in Schedule "A" and which those holding foreign securities are required to answer before they can complete their registration.

As the bill progressed through the House, Professor James Landis, now a member of the Federal Trade Commission, offered some valuable suggestions and, together with the draftsmen of the committees, assisted in shaping the legislation.

When the bill was about to pass the Senate, Senator Johnson offered an amendment on May 8, 1933, which is substantially that part of the Act known as Title II. He subsequently appeared before the conferees of the two Houses and spoke for the amendment.

Discussion in the committee centered around the same problem as presented itself in the original draft of the Securities Act relative to the approach to foreign governments whose bonds were in default. Could an official body of our Government directly approach these governments and attempt to compromise and settle or collect money owed our citizens on foreign government securities? was one of the questions that was asked. There was no doubt of the difficulty of this problem. Nevertheless a large majority of the Senate sympathized with and fully supported Senator Johnson's desire to help those holding foreign government bonds in this country. Moreover, it was thought that the granting of funds by a governmental department to the Corporation of Foreign Security Holders to be created under Title II to carry on its work from federal sources was clothing it with governmental character and such as would cause friction when the corporation came to dealing with foreign governments.

From a legislative point of view it was thought that the difficulties presented were met by inserting in the latter part of Title II, in Section 210, a declaration in substance that the corporation which was to be created and to act for our bondholders could not claim, assert, or pretend to be acting for or to represent our Department of State or our Government. And finally, under Section 212 the authority was lodged in the President to hold back action under Title II until public interest, in his judgment, should give it life by proclamation. These two sections were born of an abundance of caution on the part of Congress. They speak for themselves very clearly and indicate the department of the Government that was motivated by this cautiousness. Although the machinery of Title II has not been set in motion and other means have been created for carrying out its purpose, nevertheless it still stands as law, and in this changing world of ours should the other means

not be successful and should we come to a more direct method of transacting business between the nations of the world, Title II could still be called into action.

In place of Title II we have the Foreign Bondholders Protective Council suggested by the President, with a directorate of impressive names of high character. It is, of course, fashioned as nearly as possible along the lines of the Corporation of Foreign Bondholders of Great Britain, and the experience of the latter should, and no doubt will, be of very great value to it. The reason for the failure to call into being a corporation under Title II, and the setting up of the Council in its place, is not known to the speaker, but undoubtedly the executive was confronted with some of the difficulties in creating a corporation of holders of foreign bonds that would meet with the dangers and difficulties indicated from the language of Section 210.

The declaration at the White House given October 20, 1933, upon the announcement of the creation of the Council, stated that "The organization when it comes into existence is to be entirely independent of any special private interest. It is to have no connection of any kind with investment banking houses which issued the loans." Such a policy should be followed out literally, for it is in keeping with the position that the Government has taken in so far as its employees are concerned. We still have voluntary work on the part of those assisting the Government, but we no longer permit organizations employed by the Government or government employees to be financed by private interests who are seeking to have the governmental organization do any work for them. Now, of course, it must be conceded that the Council is not an official governmental body, but nevertheless it has had official sanction, and as it is apparently created to do the work originally intended for an official body, it should seek to be as independent of special interests as the governmental body would be. For this reason it is with regret, speaking for myself alone, that I learned from what seems to be authentic sources that the Council is receiving approximately $70,000 a year, for at least a three year period, practically all of which comes from bankers who were interested in the sale of foreign securities in the days gone by and who will be decidedly interested in the efforts of the Council. I do not think that this action is responsive to the declaration of policy on the part of the President, and some method should be designed immediately by which those owners of foreign securities who are seeking the assistance of the Council should raise the funds to pay back the various bankers and should plan in the future for a complete financial independence from them.

The Council, with its splendid roster of men, is undoubtedly on the way to moving the inertia of a mental if not actual moratorium in the minds of foreign government debtors, and favorable returns from its efforts will be reported as the world comes back to a normal condition. In the meantime, however, that inertia or condition of insolvency which exists in so many nations will undoubtedly be argued as a basis for leniency on the part of those

who are not ready to make payment on their debts. And this includes private as well as public debts.

We can imagine that payments on account, partial payments, deferred payments, and all of those insolvent conditions which confront one in private bankruptcy will be offered and rebutted back and forth across the Council table. We can also imagine that in the very near future, if not already, foreign governments that are in default will bring up as an argument in order to postpone the days of payment, the doctrine which has recently been promulgated by the Supreme Court of the United States in what will become one of the landmark cases in our jurisprudence, and which is known as the Minnesota Mortgage Moratorium case (Home Building & Loan Association *v.* Blaisdell), handed down January 8, 1934. There the Minnesota legislature passed an act the effect of which was during the emergency to suspend the rights of a mortgagee taking possession of property when the mortgagor was in default, and for the mortgagor to defer the payment of both interest and principal beyond the terms of the original contract. The following interesting and intriguing language from the court's decision may be cited by advocates representing the defaulting or insolvent countries.

> Not only are existing laws read into contracts in order to fix obligations as between the parties but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment pre-supposes the maintenance of a government by virtue of which contractual relations are worth while—a government which retains adequate authority to secure the peace and good order of society. . . .
>
> The economic interests of the state may justify the exercise of its continuing and protective power, notwithstanding interference with contracts. . . .
>
> This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.

In view of the fact that the constitutionality of the Minnesota Act was upheld, foreign debtors may ask why, if the doctrine promulgated by the Supreme Court can apply to contracts in our domestic depression, it should not with some logic apply to the contracts of foreign countries who have also been affected by the same depression? It is quite possible that this doctrine, though perhaps not given utterance up to date, has been in the minds of the foreign governments that have issued securities that are in default without knowing about the Minnesota Moratorium case.

Seeking to obtain a more detached and critical view than those of us who have been interested in the Securities Act could possibly have toward it, I have secured expressions from some of those who handle the securities of foreign governments in this country, upon the condition that their expressions should be anonymous. A British financial authority, in answer to my question as

to how the Securities Act might affect the sale of bonds issuing from his government or from private interests, said:

> These provisions are unlikely to have any direct bearing upon Great Britain since there does not seem to be any present likelihood that Great Britain or any political subdivision thereof, will wish to float a loan in the U. S. A. within any foreseeable period of time. At the same time, should the situation change, so that it were desired to float such a loan, there is nothing in the British record to prevent all the information required by the bill from being freely given or, when given, to make investors hesitate in taking up such a loan.

The German authority who was kind enough to respond to my request was not nearly so brief or complacent as the Britisher, but was more interesting in his criticisms. After complimenting in many respects our Securities Act, he said:

> Certain provisions of the Federal Securities Act of 1933 have proved to be an excessive burden for Germany as a debtor nation and German debtor companies and have also been detrimental to American holders of German securities, by either delaying payments or by rendering impracticable the making of offers to security holders.
>
> The provisions of the Act have been most conspicuously disadvantageous to both debtors and creditors in hampering the smooth and prompt functioning of a partial payment plan for the interest on all German bonds except the two Government issues. It will be recalled that the German Government found it necessary in 1933 to declare a moratorium on the payment of interest on long term loans and adopted a plan under which bondholders were offered payment of coupons partly in cash and partly in scrip of *Konversionskasse*. This method of paying coupons was put into effect in various European countries soon after the details of the plan had been worked out; however, it could not be put into effect promptly with respect to coupons payable in the United States, inasmuch as under the provisions of the Securities Act *Konversionskasse* was required to file a registration statement covering the issue of such scrip. Due to the manifold requirements of the Act and the many requests for detailed information made by the Federal Trade Commission on the basis of the Act, the payment of coupons was delayed for almost three months. It is, to say the least, doubtful whether the voluminous data and estimates contained in the registration statement are of more value to couponholders who in most cases are entitled to receive relatively small amounts, than prompt payment of whatever amount is distributable. It seems clear that all pertinent information relating to the scrip could be stated in a brief prospectus which would be readily understandable by couponholders. This procedure would also save time, effort and expense.
>
> The registration statement covered only scrip issued for coupons due during the latter half of 1933. It was not possible to file a registration statement which would cover additional scrip issuable from time to time. The German Government is continuing the scrip plan for coupons maturing during the first six months of the current fiscal year and while for all coupons payable in European countries this plan is being put in opera-

tion as soon as the respective coupons become due, it cannot be declared operative in this country unless and until a new registration statement is in effect. In case for any reason the existing emergency should, before the registration statement becomes effective, prevent all transfers, then European holders would have received the funds to which they are entitled while American holders would not have received such funds. German authorities have found it impracticable to file new registration statements at frequent intervals and are planning to file one additional registration statement to cover the first six months of this year.

A detrimental effect of certain sections of the Securities Act on reorganization of German companies and on the readjustment of indebtedness by agreement, has also been very apparent. A large German industrial corporation in January, 1934, offered to European holders of a maturing issue of its securities an attractive exchange for bonds of a subsidiary company and cash and announced that it was impracticable to make the same offer to holders residing in the United States, in view of the Securities Act. A large number of holders abroad accepted this offer, while American holders were not invited to do so.

It should be kept in mind that German corporations having no offices in New York very often do not find it practicable to deal directly with their own security-holders, but find it necessary to retain the services of New York banking houses to assist them in carrying through plans of readjustment or reorganization. The new securities, as we understand it, which would otherwise be issued in an exempt transaction would not be exempt in cases where the services of banking firms are retained in this way.

It has been a very difficult thing for America to comprehend the fact that it has become a creditor nation. In fact, outside of the financial intelligensia, few yet comprehend this complete change from being a debtor nation. Our people do understand the bitter lessons that have burned into their consciousness from the loss of over twenty-five billions of dollars in securities, a part of which consisted of foreign securities. With our ability to adapt ourselves quickly to changing conditions, we have sought by the Securities Act of 1933 to protect our purchasing public from the possibility of such losses, and we believe that this new legislation will bring success to a considerable degree in this direction. We have had set up the Foreign Bondholders Protective Council which will salvage the losses of the past, and with its personnel and the British precedent as a guide it should bring some measure of success. Paraphrasing scriptural language, we propose to leave those things which are behind to this Council of able men, and for the future we shall press forward under the Securities Act of 1933 to financial relations with other countries and their citizens in such a way as shall be of mutual benefit.

The PRESIDENT. It is now my very great pleasure and privilege to introduce Honorable Martin T. Manton, Judge of the United States Circuit Court of Appeals, who will speak upon the question of the reorganization and rehabilitation of governmental loans. Judge Manton—

# REORGANIZATION AND REHABILITATION OF GOVERNMENT BOND ISSUES

By MARTIN T. MANTON
*Judge of the United States Circuit Court of Appeals*

The belated action of the Congress in regulating interstate traffic in foreign securities came after the public of this country had lost, according to the most recent estimates, the stupendous sum of $1,500,000,000 from investments in foreign government bonds now in actual default. The exigencies of the situation created by these defaults, many of which are traceable to highly censurable practices on the part of financiers, required such action as was ultimately taken by the Congress in the form of the Securities Act of 1933. The surprising thing was that no inquiry was conducted sooner into the matter of governmental defaults with a view to remedying this unhealthy state of international financing, which was ruining alike the credit of foreign governments, the reputation of financiers, and the bank balances of the investing public. But now that Congress has definitely acted toward establishing a goodly measure of control over and responsibility for operations of this sort, we may expect a more conservative and saner type of investment financing, free, in great measure, from the devastating effects of the *laissez faire* policy heretofore pursued.

There can be no doubt that the regulation of traffic in interstate or foreign securities is a fitting field for federal supervision under the commerce clause of the Constitution. The flotation in our markets of a foreign governmental bond issue, involving, as it necessarily does, the invasion of our territorial jurisdiction by extraneous elements of commerce, cannot possibly be regarded in any other light than as "interstate commerce," a phrase broad enough to include commerce with foreign nations; and if interstate or foreign commerce, then it is subject to the supervision and control of the federal government.

Congress has regulated in a manner which, from the point of view of the investor, affords the public a most effectual protection against further losses. But more pertinent by far to the discussion before us is that feature of the Act which creates a corporate entity of a governmental character for the purpose of affording bondholders the evident advantages of concerted action against the fiscal agents of the issuers of the securities. The corporation becomes subrogated, by way of assignment, to the rights of the bondholders, and may sue for the recovery of losses that might accrue by reason of the wrongful representations or material omissions by such agents of any facts that should have been faithfully communicated, and, but for such misrepresentations or omissions concerning such facts, the bondholders would not have made the investment. The representative capacity of this corporation clothes it with the limited right, as against the fiscal agents of foreign governments, to actions in our municipal tribunals, State and Federal; but it would be most con-

venient, considering the possibility of situations arising such as the insolvency of the fiscal agents which would render suits in the municipal tribunals for the recovery of damages entirely nugatory, if this representative capacity were expanded so as to become truly "national," in the international law sense, in order to permit it to sue a defaulting nation in an international tribunal on behalf of the United States as assignee of the rights of its citizens, on the express condition, if you please, that a judgment for or against it in its representative character shall be *ipso facto* binding upon the United States as a judgment for or against the nation in its political capacity. If this were done, then bondholders would have a complete remedy,—a right of action against the fiscal agent for losses sustained on account of his fault, and an additional right of action against the foreign state for losses suffered without the fault of the fiscal agent or for which such agent cannot answer because of insolvency or some such cause. That should be the measure of protection afforded the investor. To this broadening of the scope of the Act, we can perceive no tenable objection; but it would, on the contrary, have a most salutary effect on the general investment situation.

Among the most obvious advantages of the expansion of this representative capacity are such as the avoidance of the exasperating delays incident to all diplomatic negotiations; the elimination of diplomatic friction over contractual obligations of a purely private character; the judicial nature of the adjudication, carrying with it the incidental right of compulsory methods of redress by our Government under the Hague Convention of 1907; and the entrusting of the prosecution of the claims to a technical body able to give them the required time and expert attention.

The basic problem is, of course, whether strictly private claims constitute an "international obligation" in the sense of the law of nations so as to make a foreign state justiciable in an international tribunal at the instance of private claimants. We may readily admit that the breach by a government of its contractual obligations with private individuals does not constitute a difference of an "international" character, or a breach of an "international obligation," as those terms are commonly understood in the nomenclature of international law; and this is so because only differences between sovereign states (which are the real subjects of international law) can be regarded as "international." This is probably the reason why relief is given in the Securities Act of 1933 only against the fiscal agents of foreign governments, and then in the municipal tribunals alone. Then, too, the broad principle of sovereign immunity long since adopted and adhered to in its full length by our courts, according to which no distinction is made between acts of sovereignty and acts of administration, but which clothes the state with a general and absolute immunity for all acts (whether of one kind or another), precludes the possibility of the investor suing a debtor-government in our courts to recover for losses sustained, so that the only recourse open to him is against the fiscal agent. When, however, the citizen assigns his claim to the govern-

ment (in the person of a corporation), and the government, invoking the right of protection which under international law it can extend to its nationals, espouses his claim, then that claim is no longer "private," but "national," and the failure to meet such government-sponsored claim would certainly constitute a "breach of an international obligation." And it is at this precise juncture that the advantage of expanding the scope of the Act so as to give the corporation the right to sue on behalf of the United States, becomes evident, for then the forum will be, not the "municipal," where only the fiscal agent can be sued, but the "international," where the debtor-government itself can be impleaded.

Membership in the League of Nations carries with it membership in the Permanent Court of International Justice. It is because of this universal concurrence of the nations of the world in that tribunal, that such tribunal is the logical one to pass upon questions which involve their credit and honor as nations. Although the court is "competent to hear and determine any disputes of an international character" which the members of the League submit to it, and more concretely, "all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force," there is no provision in virtue of which the court can acquire jurisdiction over a nation without its consent, except in legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation.

It seems to us clear, beyond peradventure, that the assignment to our Government of a private claim against a foreign state, and our Government's espousal of that claim, would be sufficient to give the court compulsory jurisdiction under the statutes of the court, since there would be a "fact"—nonpayment or, in the language of the law, denial of justice—which would constitute a breach of an international obligation; assuming, of course, that our view is correct that governmental subrogation to private claims is all that is required to make those claims the object of international reclamations.

The United States, though not a member of the court, could sue therein on whatever conditions the Council of the League might lay down.

In most cases, especially where government bonds are involved, the grounds most commonly invoked in justification of the defaults and repudiations have been: (a) an alleged inability to pay, or (b) the pretended harshness and inequitableness of the original terms of the loan. The first ground —the inability to pay—seems to be practically incredible, and, we should add, is legally inadmissible. Borrowing governments, when they apply to the prospective lender for a loan, represent themselves always as actually possessed of the potential resources from which sufficient revenues will be forthcoming to make certain the amortization of principal, sinking-fund and interest on the bonds as they mature. We cannot possibly impute to

those governments the intent to misrepresent or defraud. For a prospective borrower-government to make negative or false representations concerning its financial condition, capacity or disposition to pay at some future time, would naturally result in impugning its credit, and consequently, in the unqualified refusal of the loan. The presumption strikes one with a conclusive effect that, as a practical matter, the government *can* pay, and as a legal question, that it *must* pay. And, although, in fairness, it must be conceded that, in times like the present, when a widespread cycle of economic depression has adversely affected business, private resources and governmental revenues the world over, reducing, to a degree, the capacity of many governments to pay out of the ordinary revenues, yet, many special emergency measures of fiscal retrenchment on the one hand, and increment of governmental income on the other, can and should be adopted by debtor-governments in order to meet those obligations contracted on the faith and credit of their capacity for payment, thus saving the honor and integrity of the nation: qualities so essential to the state in the political and economic order of the family of nations. Then too, many of the outstanding obligations went into default years before the present crisis set in, when governments were in rather favorable circumstances financially, so that the failure to pay cannot be attributed in those instances to such excuses as are invoked to justify the defaults under the abnormal conditions of today.

The second ground, harshness and inequitableness of the original terms of payment, though indefensible in a legal sense, presents a more plausible excuse, and one which, in view of changed material conditions, may call, as a matter of policy, for some suitable adjustment, reorganization or scaling down of the terms of the loan. Changed conditions making the original terms manifestly unfair and onerous, may warrant a demand for their partial modification, but can never excuse the outright unilateral cancellation or suspension of payments (as has been done) on bonded governmental indebtedness otherwise validly contracted. Creditors are helpless at present in the face of this general condition. Both grounds suggest a serious defect in the mechanism of the existing financial structure which calls for the adoption, and that most urgently, of some remedial method and the creation of some suitable agency whereby the whole question of capacity to pay, change in material conditions, and others that might arise, may be impartially inquired into, and, if they are found to exist, the terms and conditions of the obligations may be equitably ameliorated, or perhaps allowed to stand and be enforced.

The tremendous losses inflicted on private investors on account of these defaulted or repudiated loans have not all been due to any such changed conditions as have affected the governmental capacity to pay. Governments borrow, as a general rule, when in need of an actual money reserve to defray current or special items of expenditures for which the ordinary revenues are momentarily inadequate. In most cases, the potential resources of the

country fully justify the risk of a loan on its credit. Sometimes governments have borrowed, not because in need of a loan, but at the instance of corruptly-minded bankers who have seen the chance to unload on an unsuspecting public unsound governmental securities bought at large discounts, to meet payments on which the ordinary and even extraordinary revenues of the country were inadequate. Recent revelations in the United States have shown that in many instances the fiscal agents of foreign governments who have been commissioned to negotiate a loan, have unconscionably concealed, colored or misrepresented material facts available to them only, which bore directly upon the economic soundness of the borrowing country and the capacity or disposition of its government to pay. Financiers everywhere, in England, in France, in the United States, the history of foreign governmental financing shows, have been guilty of these reprehensible methods, and to them is to be imputed immediate responsibility for the loss of many millions of dollars invested by the general public under a misapprehension of the real facts. President Roosevelt, in his message to Congress of March 29, 1933, urging the passage of a law for the federal supervision of interstate traffic in investment securities, blamed the "practices neither ethical nor honest on the part of many persons and corporations selling securities," for the severe losses sustained by the American public.[1] Such legislation as the Securities Act of 1933, enacted by the Congress pursuant to the President's recommendation, protects the public against future, but not against past, losses. Nevertheless, as to the future, the Act reasonably safeguards the interests of the public.

Let us inquire rather briefly into the methods of redress that have been available to private creditors under the traditional and accepted practice of diplomacy. This inquiry is necessary, we believe, the better to appreciate the merits of the solution to the problem of non-payment which we suggest.

The default by a government in the payment of its external obligations to private investors (whatever may be the reason it may choose to assign), constitutes, no doubt, a tacit denial of justice which excuses the creditor from the condition of abiding by the rule of international law that otherwise would require him to resort first to the tribunals of the defaulting nation to enforce payment of the debt, since if the nation declines to pay obligations which, though contracted on a purely legal basis, depend more for enforcement on its honor than on the law of the case, especially in those countries where the government is immune from suit in its own courts at the instance of private persons, the farthest that a local tribunal could go would be to make an academic and unenforceable adjudication on the legal duty of the government to pay. Still (and notwithstanding and because of such adjudication), there would be a case of manifest denial of justice in the international law sense such as will justify the creditor in having direct recourse immediately to the diplomatic agencies of his government for relief.

When a government takes up the cause of private creditors with a view

[1] New York Times, March 30, 1933.

to negotiation, it becomes subrogated to their legal and equitable rights,[2] and, national and international considerations of policy permitting, may submit its demand, without more, to the foreign government for a satisfaction of the claim. If, however, the controversial element enters into the question of legality, harshness of the original terms of payment, etc., it may offer to submit the matter to arbitration, though not obliged to do so. This, as is well known, is the ordinary course of diplomacy. However, the refusal either to negotiate or to arbitrate on demand of the creditor-government, may ultimately lead to the employment of measures of compulsion to obtain a satisfaction. A number of countries have been subjected now and then to this process, which, although extreme and harsh, falls nicely within the scope of the general and strict law of nations, and comports with the constant practice of the most responsible states. Lord Palmerston's circular of 1848 to British representatives abroad in regard to the unsatisfied claims of British subjects who were the holders of public bonds of other states, made it plain that the right of the British Government "to interfere authoritatively" was "entirely a question of discretion, and by no means a question of international right," whether they should or should not make this matter the subject of diplomatic negotiation. "If the question is to be considered simply in its bearing on international right, there can be no doubt whatever of the perfect right which the government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the government of another country, or any wrong which from such foreign government those subjects may have sustained; and if the government of one country is entitled to demand redress for any one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the government of another country, the right so to require redress cannot be diminished merely because the extent of the wrong is increased, and because instead of there being one individual claiming a comparatively small sum, there are a large number of individuals to whom a very large amount is due." [3] This doctrine is approved by jurists of recognized authority.

We have said before that this general breakdown in governmental integrity pointed to a serious deficiency in the structure of international finance, calling, in a most pressing manner, for the adoption of an efficient method and agency of relief.

The method proposed is the simple expedient of an ordinary judicial adjudication between the creditor and the debtor-government. The distinction made by the "juridical person" theory of that school of juristic thought of which the Italian courts are the foremost champions, between acts of sovereignty (*jure imperii*) and acts of administration (*jure gestionis*), which recognizes the state's immunity for the former and its liability for the latter,

[2] Frelinghuysen, Sec. of State, *v.* Key (1884), 110 U. S. 63.

[3] Quoted in Hall, A Treatise on International Law (4th ed.), p. 294, and 2 Phillimore, Commentaries upon International Law (3d ed. 1882), pp. 9–10.

enables the tribunals of the creditor-state to assume jurisdiction of actions to enforce the payment of the obligation, since in the light of that theoretical distinction, the contractual engagements of a state, as for example, the issuing of bonds in recognition of a debt, are acts of pure administration.

On the other hand, under the "sovereign immunity" theory (of which the United States, Great Britain, France and Germany are the main exponents), which does not make this distinction between acts of sovereignty and acts of administration, but clothes the state with a general and absolute immunity for all acts (whether of one kind or another), no suit in the local courts is possible without the consent of the debtor-state. The English case of Twycross *v.* Dreyfus,[4] is a direct and authoritative adjudication of this question.

The jurisprudence of France is to the same effect.

Here, then, are two divergent and apparently irreconcilable lines of legal reasoning. The one recognizes and enforces as a contract what the parties have clothed with the formalities of such; the other transforms into an engagement of honor and therefore unenforceable, a transaction which the parties have executed on a definite contractual basis. The divergence in result is due to a divergence, or at least a certain variation, in the concept of sovereignty, and, in the logical rigors of each theory (whatever may be said of its premises), the result is perfectly sound.

The most evident practical effects of this divergence in legal theory are four: (a) it makes uniformity of remedy impossible or at least unlikely in the cases of large issues of bonds widely distributed in countries following the one theory or the other; (b) as the effectiveness of the judgment of a court adopting the "juridical person" theory depends entirely upon there being property of the debtor-nation within the jurisdiction of the court, its enforcement might unnecessarily result in diplomatic friction; (c) creditors in a country following the "sovereign immunity" theory will find themselves, as a tribunal put it, "without remedy," beyond such as is provided in the bond, or such as they may induce the political department of its government to resort to in their behalf; (d) the judgment of the courts of the creditor-nation, not being an arbitral adjudication within the terms of the Hague Convention, need not be recognized and submitted to by the debtor-state (unless it has voluntarily yielded to their jurisdiction), and its non-recognition cannot form the basis for armed intervention.

The need for a more impartial, authoritative and effective agency, but in any event for some sort of superior agency to give a more prompt relief than the ordinary methods of diplomacy afford, is to us quite evident. Under the present organization of the society of nations, there is no higher, more authoritative and competent agency for the judicial determination of international claims against a debtor-state than the Permanent Court of Inter-

[4] (1877), 5 Ch. Div. 605, 616 (Italics ours). *See also*, Smith *v.* Weguelin (1869), 8 Eq. Cas. 198, 212.

national Justice. It is this court which we propose should be made the sole and final arbiter of all issues between such state and its creditors.

The court is, in general, "competent to hear and determine any disputes of an international character" which the members of the League of Nations submit to it. This broad and general competency of the court comprises, more concretely, "all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." [5] The court is also open to other states not members of the League on conditions to be laid down by the Council of the League.[6] The states which submit to its jurisdiction accept compulsory jurisdiction in legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.[7] In the determination of any disputes or cases submitted to it, the court applies: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[8]

At the outset we are confronted with a jurisdictional objection, namely, that "only states or members of the League of Nations can be parties to cases before the court." [9] But to surmount this objection we propose one of two alternatives, that is to say, either (a) to amplify the statutory powers and jurisdiction of the court so as to permit actions before it against a debtor-nation at the instance of its creditors, providing the total amount of their claims exceeds a minimum amount of the defaulted bond issue, or (b) the creation of governmental agencies, such as the recently established corporation of Foreign Security Holders in the United States (and the British privately founded Corporation of Foreign Bondholders, which could be clothed with governmental character for the purpose), which, acting for and on behalf of their respective states, may sue and be sued in the court upon matters arising out of a specific issue of bonds. The American corporation has been given power "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal." [10] Such a provision would require slight amplifications to enable it to bring suit in the Permanent Court of International Justice.

The main advantage of the first alternative is that it tends to avoid direct international complications, and would enlarge the scope of the statutory

[5] Art. 36, Statute of the Court. [6] Art. 25, *ibid.* [7] Art. 36, *ibid.*
[8] Art. 38, *ibid.* [9] Art. 34, *ibid.*
[10] Sec. 203, Title II, Securities Act of 1933, known as Corporation of Foreign Bondholders Act, 1933.

expression "international obligation," to include the contractual debts of states to private creditors. The second alternative dispenses with the need of changing the statutes of the court, and all that would be required is a delegation of governmental authority under the state's supervision. Under the latter alternative, there would be a full compliance with the statute of the court, in this, that a "state" (by its agent, the corporation) would be the party to the case before the court, and that there would be a "fact" (non-payment, or, in the language of the law, a denial of justice) constituting "a breach of an international obligation." Then, too, there might be the "interpretation of a treaty," as where the authority to make the loan is impeached as in contravention of treaty provisions.[11] The court is given power to decree the "nature or extent of the reparation to be made" for the breach of the international obligation.[12]

The court has all the power of an equity court. Its jurisdiction is the whole domain of conscience. With such equitable powers it might reorganize a bond issue under terms agreeable to the majority of the bondholders and their debtors. This could be accomplished much as a court of equity accepts and approves plans of reorganization of corporations. A debtor-nation unable temporarily to pay might submit its statement of its inability to pay by showing its receipts of customs and taxes, and the court could direct payments in equity and fairness in accordance with this showing. This would be a guide for terms of a plan of reorganization. Interest terms might be lowered, sinking fund requirements changed, and time of payment extended. The court should be seized upon by the debtor-nations as readily as creditors, as a forum for rehabilitation of obligations upon terms fair and just to all. If it were required to have a receiver for payments or accommodation temporarily, the court and the parties might well make use of the Bank for International Settlements. That institution could render a new service internationally at the request of the court or at the instance of the parties' desires.

The problem of the enforcement of the court's decrees may offer, perhaps, slight practical difficulties; but these could be cured by proper legislative action, or maybe by a recasting of our juridical concepts of sovereign immunity. For instance, the Securities Act could be so amended as to give our courts, upon such condition as previous notice to the judgment-debtor, authority to issue all necessary processes in aid of execution against the property and assets of the debtor-nation. The process of the local courts may aim at the foreclosure and sale of collateral deposited by the debtor-government with the fiscal agent or bondholders; at the attachment of its revenues or property (whether consular, commercial or industrial); in fact, the process may be of such character as a judgment-creditor may ordinarily take against a judgment-debtor under local law. Then, too, the judgment-creditor may

[11] *E.g.*, Cuba, under the Treaty of Permanent Relations of 1904 with the United States.
[12] Art. 36 (d), Statute of the Court.

have recourse to such political measures as economic boycott, or the employment of the armed forces of the nation if the debtor-nation "fails to submit to the award." But we do not think that a debtor-nation will resist the initial decree of satisfaction of the court; but feel, on the contrary, that it will spontaneously seek some means of complying with it, or at least of making suitable arrangements for the prompt satisfaction of the claims which form the basis of the court's judgment.

In conclusion, then, we may say that the problem of giving the holders of foreign bonds adequate protection is both a national duty and an international necessity. The reëstablishment of international credit on a solid basis is absolutely essential to the structure of world finance, otherwise we shall perceive the speedy collapse of the constructive undertakings now being carried on everywhere on the credit of nations. Both municipal and international laws and judicial machinery should be mobilized to this laudable purpose. Things cannot go on the way they have been, otherwise nothing but chaos will loom in the horizon of world finance, to the grief of needy nations and the regret of defrauded creditors.

The PRESIDENT. On behalf of the Society, I desire to extend to both of the speakers an expression of our sincere appreciation and of our gratitude for their appearance tonight, and for the enlightenment which they have given us on these difficult questions. The discussion will be led by Mr. George Nebolsine, a member of the New York Bar.

Mr. GEORGE NEBOLSINE. Ladies and gentlemen: I think all of us who have heard these two very interesting approaches to the problem of the protection of foreign bondholders appreciate the fact that it is impossible to discuss all of the points that have been presented in a very brief period of time.

I propose to go into two questions that occurred to me in listening to Judge Manton, which, I think, present special interest. The first is to what extent should the State Department or a council of foreign bondholders enter or be required to enter into the solution of the difficulties which the holder of defaulted foreign government bonds now finds himself. The second question is as to what tribunal or what judicial body should any question that arises in connection with defaulted foreign bonds be submitted; should this judicial body be the Permanent Court of International Justice or some other body.

In the first place, it seems to me that we must appreciate the distinction between questions arising from the construction or interpretation of a given defaulted bond or loan agreement and questions of enforcing any judgment that may be entered in connection therewith. In the history of past defaults, there are very many cases where disputes arose over the construction or interpretation of loan agreements aside from the question of enforcing payment. Perhaps the best known examples and those that have inspired the most com-

ment are the famous Serbian [1] and Brazilian [2] bond cases before the Permanent Court. These cases did not involve the question of the enforcement of the obligation. The question presented to the court was purely one of interpretation of a clause in the bonds under the facts that arose, namely, the devaluation of the currency named in the obligation. It is with reference to such questions as this that it seems to me the greatest progress can be made in submitting cases to some form of arbitration or adjudication.

In order to assure the submission to judicial adjudication by declaratory judgment of such questions of construction or interpretation as may arise without the political interposition of the creditor's government, it will be necessary in future bond issues to insert a stipulation in the form of an arbitration clause [3] whereby the debtor agrees in advance to submit certain types of questions that might arise to a certain form of settlement. If holders of foreign government bonds should in the future be assured of judicial adjudication of all questions of the construction of the bonds and the interpretation of their rights in view of new circumstances that may arise, a great step towards the elimination of the evils referred to by Judge Manton would have been accomplished. Questions which should be subject to judicial construction of this kind, without involving the principle of the immunity of the foreign debtor state, are as follows:

First, any question of priority of payment as between different series of bonds of the same debtor. This type of question has frequently arisen, and in the past has been submitted to arbitral settlement, as in the case between France and Chile in 1892, where such a case was submitted to three judges of the Swiss Federal Court.[4]

Second, the question of whether bondholders of one nationality may be preferred over the holders of other nationalities. At this time there is a controversy of this character going on with respect to the holders of German securities. Such controversies have occurred frequently in the past, and have been the subject of diplomatic interposition. A recent case was the case of the Bulgarian loans in 1922,[5] when the matter was brought up and settled through diplomatic channels. There appears to be no reason why this sort of question should not be settled by arbitration.

Third, the interpretation of the obligation with reference to the medium or amount of payment stipulated therein. This is the classical case of the Brazilian and Serbian loans. Similar controversies have existed in the past

[1] Case of Serbian Loans, Judgment No. 14.

[2] Case of the Brazilian Loans, Judgment No. 15.

[3] See E. Feilchenfeld, "Rights and Remedies of Holders of Foreign Bonds" in Quimby, Bonds and Bondholders (1934), §§636, 664.

[4] Cited in W. H. Wynne, Peru: A Study of Foreign Debt Defaults and Readjustments (unpublished). See E. M. Borchard, *Proceedings* of this Society, 26th Meeting (1932), p. 135, for examples of priority.

[5] W. H. Wynne, Bulgaria: A Study of Foreign Debt Defaults and Readjustments unpublished).

and are likely to be more frequent in the next few years.[6] Such a controversy occurred between the French and British Governments over the French loan floated in England during the war. This led to an exchange of correspondence in 1930,[7] but did not bring about an arbitration, which might have more clearly determined the rights of the parties.

The fourth type of question is the question of the diversion of the security of a given bond issue in violation of the covenants contained therein. While this is primarily a question of fact, if it is not submitted to arbitration in one form or another, it is the very type of question that is most apt to give rise to governmental interposition in behalf of bondholders which, as a general principle, I think, should be avoided. This type of case also touches on the famous case of Twycross *v.* Dreyfuss,[8] a very unfortunate decision, I think, although probably in conformity with existing law. Any scheme of arbitration which seeks to protect the bondholders against the debtor should have in mind overriding the rule of the Dreyfuss case, by making such funds as have been allocated to the bondholders and actually transferred to the country where the bondholder is located, subject to being reached by the bondholders through the courts.

The fifth type of question that can be submitted to arbitration is the effect of new conditions, unforeseen by the parties, upon the nature and scope of the obligation. This would be an indefinite clause in the sense that it might draw in all kinds of unforeseen contingencies, and present a chance for arbitral settlement.

It seems to me that the submission of such questions as these to judicial process should not be regarded as a serious derogation from the principle of sovereign immunity, inasmuch as a mere declaration of the rights of the creditor is all that is involved.

In order that the holders of future bond issues enjoy these important privileges, it is necessary to provide in the loan agreement itself the procedural machinery for the submission of such questions to arbitration. The nature of the machinery that is set up depends largely upon what court or what body is to be nominated as arbitrator. The Permanent Court of International Justice is not the proper tribunal to adjudicate disputes between a foreign government and a group of individual citizens, if the interposition of the State Department is to be avoided. Any effort to bring such cases before the court by making the councils or committees of foreign bondholders

[6] The potentialities of the "Gold Clause" problem are very far reaching and are particularly susceptible of judicial settlement. See A. K. Kuhn, "The Gold Clause in International Loans," American Journal of International Law, Vol. 28 (1934), p. 312; Nebolsine, "The Gold Clause in Private Contracts," 42 Yale Law Journal (1933), p. 1051.

[7] Correspondence respecting Position of British Holders of French Rentes issued in the United Kingdom in 1915–1918, France No. 1 (1931), Cmd. 3779. See H. B. Samuel, The French Default (1930).

[8] 5 Ch. D. 605 (1877), 36 L. T. R. (1877). See also, Ezra *v.* Lamont, 149 Misc. (N. Y.) 912 (1933), aff'd Appellate Division April 20, 1934.

arms of the government, would merely have the effect of bringing the State Department into the controversy.

The alternative is to name in the loan agreement a private organization, such as a council of foreign bondholders, having no direct connection with the government, to represent the bondholders for the purpose of bringing such suits, and also to set forth the method of selecting the arbitrators who are to hear any complaints that might arise in regard to the interpretation of the agreement. In this connection, it might be well to consider the desirability of appointing specialists, or selected individuals who would be qualified to reach a proper solution of the questions presented to them. The elaboration of this idea is largely a matter of drafting, once the fundamental policy of arbitrating questions of construction and interpretation is adopted.

As for the sanctions for having such a clause inserted in loan agreements, it is perfectly obvious that the mere expression of a desire to include such a clause in loan agreements does not accomplish the result. However, we have today the most comprehensive legislation governing the issuance of and dealing in foreign securities that we have ever had. Moreover, if the Stock Exchange were to stipulate as one of the conditions for the listing of new issues of foreign government bonds that the loan agreement must contain an arbitration clause, the result, from a practical standpoint, would be as effective as any legislation that Congress might adopt. This is confirmed by the experience of the past, which shows that in 1887 the London Stock Exchange threatened to forbid the listing of new Chilean bond issues because the Chilean Government was not negotiating with bondholders, with the result that the Chilean Government promptly entered into negotiations with the holders of the defaulted bonds.[9]

Again, in 1909, the French Government threatened the Government of Peru with refusing to permit the listing of new Peruvian securities. This immediately brought about the desired negotiations with the creditors who had outstanding claims.[10]

There are many such examples in the past. I think there is very little question that refusal to list is one of the strongest penalities that can be imposed.

Aside from voluntary action on the part of the Stock Exchange, the Securities Act or the Stock Exchange Bill might be amended to require the insertion of such an arbitration clause in foreign government bonds as a condition to their registration with the Federal Trade Commission, or their listing on the Stock Exchange respectively.

Finally, the investment bankers might well consider the adoption of such a practice in their code of fair competition, which has a very elaborate schedule of practices governing the dealings of investment bankers. They might adopt, as a fair trade practice, the requirement that such an arbitration clause be inserted in all foreign government bond issues.

[9] Wynne, *op. cit.*, note 4.

[10] *Ibid.*

The subjection of new issues of foreign government bonds to adjudication, at least in so far as concerns the question of interpretation of the rights of the holders, is a practical possibility. It is the logical first step in relieving a serious deficiency in the structure of international finance.

The PRESIDENT. The next speaker is Mr. Edgar Turlington, a member of the Bar of the District of Columbia.

Mr. EDGAR TURLINGTON. As I listened to our distinguished visitor from the Federal bench, I could not help being reminded of the familiar lines of an American poet regarding:

> Truth forever on the scaffold,
> Wrong forever on the throne.

With apologies to the Judge and to the poet, I may perhaps alter those lines very slightly somewhat as follows:

> Bondholders ever on the scaffold, debtor governments on the throne;
> But that scaffold sways the future, and behind the dim unknown
> Stands the World Court in the shadow, keeping watch above its own.

The bondholders do appear to be on the scaffold, or "on the spot," and their greatest difficulty is due to the fact that debtor governments are on the throne. There has been an undercurrent of sympathy among sovereigns, with a decided reluctance to press the matter of financial defaults, ever since King Stephen was obliged to pledge his crown for a loan and King Philip or King Wenceslaus felt that he might shortly have to pledge a fragment of the True Cross for a loan. The sovereign immunity of governments is the most serious obstacle to the settlement of the question of public debts on a juridical basis. As to the application of the remainder of the altered lines, I am less certain. It is not at all clear to me that in watching over the financial defaults of governments the World Court would be keeping watch above its own. I am not at all sure that the World Court has or could properly be given jurisdiction over national bonded obligations.

Judge Manton finds that there is a serious deficiency in our financial structure. He believes it may be remedied by a provision for adjudication by the World Court, under the clause giving compulsory jurisdiction over breaches of international obligations. He suggests that the failure to meet a debt claim sponsored by a government constitutes a breach of an international obligation. I submit, with due respect, that the failure to meet a government sponsored claim does not necessarily constitute a breach of an international obligation. Two years ago Professor Borchard read here a paper in which he said that only repudiation of a debt or wilful breach of the obligation of a debt is regarded as a violation of international law. He said also, as I recall it, that the obligation of a public bond is a fact to be dealt with in the economic sphere rather than in the legal sphere. This view is pretty generally accepted by international lawyers.

Judge Manton mentioned the case of La Abra Mining Company, in

which a claim made by the United States upon Mexico was later found to have been supported by fraudulent evidence. Did that claim become an international obligation because we presented it to Mexico? Was the legal basis of the claim—a fraudulent claim—altered by the fact that it was temporarily espoused by our government? If you have a bond issued by a foreign government, you certainly have some kind of an obligation. Suppose you try to sue in a court; suppose you are allowed to sue in the court of the debtor country, and you get a judgment, or suppose you are not allowed to sue in the court and you do not get a judgment. You have an obligation as between the holder of the bond and the government. I am not sure that an obligation is set up as between the two governments merely because one government espouses the claim of its national against the other government.

Judge Manton also quoted the famous dictum of Lord Palmerston. That dictum undoubtedly states a fact in international relations. It is a fact that one government can use its own discretion as regards the presentation of any claim which it considers to be well-founded to another government. I do not think it necessarily follows that anything which one government may choose to present as a claim is an international obligation or gains any weight, by being presented, that it did not already have as an international obligation.

Our own government has always realized that it was possible for it to present debt claims and bond claims, but it has taken the position over and over again that it is not proper, it is not advisable, and, I think we have said it is not in accordance with international law, for the Government of the United States to take a direct part in the settlement of what we call foreign debt situations.

As a lawyer interested in the orderly settlement of international difficulties—and, I might add, as the holder of two or three bonds now in default —I, personally, should welcome the setting up of an international tribunal for the rehabilitation of foreign bonded obligations "upon terms fair and just to all." I am quite sure that the Judge is right in saying that some debtor governments would gladly submit to the jurisdiction of such a tribunal, but I am not at all sure what would be done in case some of the others did not submit.

I was a little disturbed by Judge Manton's statement that the inability of a debtor government to pay is incredible. I presume that Judge Manton puts a different interpretation upon the Minnesota case from that Mr. Thompson gave. It seems to me that in the Minnesota case we had definitely some situations in which debtors were unable to pay. I do not know whether they misrepresented their capacity to pay at the time they entered into the obligations. It would seem, however, that there was some reasonable doubt whether they were capable of paying at the time they were asked to pay.

I should like to go into the question of the practical difficulties of "sicking" the World Court on the defaulting governments, but I am sure that other people would like that pleasure and I shall not take it away from them. The

bondholders are not altogether helpless, I may note, even in the absence of a tribunal which can judge the defaulting debtors. Organizations such as the Foreign Bondholders Protective Council established last December, and now directed by former Ambassador Clark, have formidable powers of persuasion, and with such organizations pulling together in different countries and uniformly supported by their governments—not always with diplomatic delay and not always with diplomatic friction—it can be made very well worth while for governments in default to honor their obligations and, in proper cases, to submit to arbitration.

Mr. Thompson raises a question which I should not like to let pass entirely, and that is the question of the financing of the protective council. My information is the same as Mr. Thompson's, to the effect that a considerable amount of the financing of the council comes from the bankers. I agree with Mr. Thompson that it would be much better if the council were not financed by the bankers. I am not sure I can make any suggestion to get around that difficulty. One suggestion that has been made is that a *pro rata* assessment might be put upon the people who turn in the bonds for assistance. Against that it has been urged that people who are asked to pay an assessment are apt to think a "racket" is going on. The protective council might conceivably take a leaf from the book of the defaulting governments. It might float an issue of bonds, possibly deferring the payment of interest for the next five years. I offer as a suggestion, an issue of $500,000 or $1,000,000 of bonds at 90, with interest at 4 per cent. to begin in the year 1939. That is one way in which you might finance the council.

I should like to call your attention to a book that has just come to my attention today. It is just off the press, and one of the authors, Dr. Feilchenfeld, formerly of Harvard, is present. I hope he may tell us something about what he has put into the book. He has told me a good deal about things to be borne in mind in drafting loan agreements in the future. The title is S. E. Quindry, *Bonds and Bondholders' Rights and Remedies.*

The PRESIDENT. In accordance with the suggestion, may we hear from Mr. Feilchenfeld?

Mr. ERNST H. FEILCHENFELD. I am very grateful to Mr. Turlington for his kind reference to my recent publication, but I would like to say that it is only a very brief one. It is only a survey, and does not fill the function of an exhaustive legal text-book on the whole field. Instead of raising additional technical points, may I review briefly the various practical problems that confront us?

First, the problem of what agency is to undertake the protection of the bondholders. The new agencies to be considered are, firstly, the Federal Trade Commission as a supervisory body, and, secondly, agencies representing bondholders. Representation of bondholders involves difficulties in this country which are almost inherent. Normally, the bondholders should have an agency which they support themselves. That is the ideal solution, but ap-

parently it has not been found possible so far. It may turn out to be possible during the next few months. Another solution seems to have met with considerable difficulty, namely, to obtain the money for the protection of bondholders from some of the various endowments interested in international work. The difficulty here, apart from the general shortness of money, is that the problem is a somewhat commercial one; for, clearly, it concerns protection of private interests primarily. It does not involve quite as directly the same considerations as some other types of work—peace, disarmament and like problems. However, I would like to submit an idea of Mr. Turlington, whether there is not more of a general or public aspect to this problem than is generally admitted; whether, if the work of the new agency is directed not merely toward the collection of money, but toward the improvement of international machinery in a field which is not unimportant, it may not serve as an example for other fields. In that case, I believe, it should not be inconceivable that a public interest could be admitted.

The remaining solutions, the only ones which have been in the foreground during the last year, are not ideal. In the one case, it is difficult to create an agency which is not too much on the governmental side. In the other case, it is possible to create an agency which is not controlled by bankers; but it is more difficult to create an institution which some people would not suspect of becoming subject to the influence of bankers. This latter problem is difficult because it is not technical; it is psychological. Even so, I believe the work of any agency will be judged, not by its original composition, but by the actual work which it will do.

The important question at first was, peculiarly enough, not the protection of bondholders, but the prevention of new loan issues at a time when comparatively few seemed to be imminent. May I submit, however, that it is not as easy to get reliable information about a foreign country as it is to apply ordinary commercial methods and check up on a domestic or even a foreign corporation. Such facts as the possibility of revolution in the near future, or war, the general temperament of the nation, are difficult to describe, especially in Federal Trade Commission records. Such considerations have in the past been of extreme importance in judging the financial record of a country; but they are not quite easy to fit into a technical report. Besides, even a past record is by no means a reliable forecast on future developments. I hope that those who will do this supervisory work will not have to incur a moral responsibility, even indirectly, for permitting certain loans to be floated.

Next we come to the present point, what can be done where default has occurred? Now, the most obvious suggestion is to go to court, if you can. The trouble is, you usually cannot under present conditions. I leave aside for the moment the possibility of suing before the tribunals of the debtor state as of no great importance. For most governmental loans, I think, we can also leave aside the possibility of suing a foreign government in the courts of the creditor. Even assuming for a moment that jurisdiction would exist,

and assuming further that the loan agreement does not contain gaps, and that one could get a satisfactory decision, the assets are likely not to be here but in the debtor country. This puts international machinery into the foreground.

Unfortunately, the loan agreements do not embody arbitration clauses. They were drafted in 1922 and the following years and, consequently, in practically all cases, as Mr. Nebolsine pointed out, getting before any international tribunal will depend upon the consent of both parties. There are some cases where the debtor government might feel it is in such a weak position that it cannot arbitrate. There may be other cases where the loan agreement is a bit deficient, and where, although some questions of justice are involved, the creditor may be reluctant to submit the matter to arbitration. If you submit the matter to arbitration, then the point comes up which I have discussed in my book, and which Mr. Turlington has stated, namely, is the Permanent Court the financial tribunal of the future? I think we ought to warn against any thought of policies or provisions which would limit arbitration to any one international public tribunal. There are likely to be cases where foreign governments may agree to arbitration, but may not be willing to agree to arbitration by the Permanent Court.

The second limitation, I think, was mentioned by Judge Manton, and quite definitely by Mr. Nebolsine; questions of interpretation are not the only questions involved. There are many questions which are largely, if not exclusively, questions of fact, and many others where a decision is of little effect because you need a new settlement plan. Just how the two ought to be combined remains a problem. Personally, I do not believe that any international body could be created immediately. I would suggest, as an in-between proposal, the tentative creation of an American panel, both for arbitration work and commission work, which could be used as occasion arises.

In case you cannot get arbitration, what can you do? Some years ago every writer on the subject started in by discussing intervention and had a picture of soldiers collecting debts abroad. The picture was unreal, because there were few cases where soldiers were sent to collect debts. The idea is pretty dead, not only for legal reasons, because it is illegal to do it. Few soldiers would like to fight for bondholders. It is equally unlikely that bondholders who are unwilling to raise $150,000 a year for a council would be willing to pay the cost of an army going to the debtor country.

The limitations are more serious than would appear from newspaper discussions of recent months. There are two kinds of real sanctions, economic boycott and financial boycott. It is possible, of course, if the debtor state does not pay, to invoke a general economic boycott, but it is fairly difficult in a country like the United States to maintain an economic boycott even against one country. I am not saying this is not a remedy to be kept in the background, but it is not a remedy which can be used in the regular case. Even the remedy normally recommended, financial boycott, has its limita-

tions. If a country is in financial default, as many countries are, it is easy to say, "This country is not permitted to float new loans here." They would not now float new loans anyway, and if they did, nobody would buy them. The real test is, are you willing to maintain the financial boycott until the period arrives when, for other reasons, bondholders and bankers would regard such investments as profitable? So, even this financial boycott is not an infallible remedy.

This takes us back to a seemingly very mild remedy, namely, publicity and annual reporting. This will remain the normal remedy. The only improvement I would like to suggest is a comparative rating to be applied in the future on a slightly more technical basis, by stressing certain delinquencies —such as refusal to arbitrate, grossly confiscatory acts—leading to a report where such countries are rated at the bottom of a graded list.

For the future, even for refunding agreements, I think it is very essential to undertake a study leading to improved drafting of loan agreements as one remedy for improvement, and, incidentally, including the drafting of arbitration clauses.

It seems to me that apart from the general things discussed, there are three things which I would like to advocate: first, a carefully worked out and gradually to be developed American policy with regard to sanctions, not putting harsh sanctions in the foreground; secondly, a definite effort to improve loan agreement drafting; and, thirdly, if possible, the continuation of the effort to improve the compilation of precedent material.

The PRESIDENT. Is there any further discussion?

Mr. JAMES O. MURDOCK. While there is no insuperable objection to placing the international standard regarding public debts on a higher level than the municipal standard, we might for a moment pause to project an analogy of the discussion tonight into the domain of municipal financing. I am not familiar with the possibility of a private individual haling one of our several States or cities into the Supreme Court of the United States when bonds are in default. It would appear, therefore, that the discussion tonight is well in advance of municipal legal responsibility. It might be more persuasive to achieve a standard of governmental legal responsibility for the repayment of loans in the field of municipal law, before this course is suggested to the nations of the world in the domain of international finance.

Professor QUINCY WRIGHT. I should like to suggest in this discussion of possible sanctions, that perhaps one of the most practical things that can be done to collect defaulted bonds is to make it easy for the debtor to pay. I think we are all agreed that the use of military force is out of the question. It is true that as recently as 1902 certain governments occupied the customs houses in Venezuela. After that we had the Drago Doctrine and the Second Hague Convention of 1907.

The question of getting the matter submitted to a court seems to be relatively unimportant in most of the types of circumstances which arise in times

of depression. Usually, the debtor admits the obligation, but says he cannot pay. The court can do nothing but say that he owes the obligation unless it undertakes the task of instituting a receivership which would be a political rather than a judicial function when applied to a sovereign state.

When a government admits an obligation but says it can not pay, what does it mean? It may frequently mean that it feels it would lose its life if it did not spend money on domestic improvements or if it taxed its people more and paid money to foreigners. In such cases we have a domestic political question for the debtor government to solve. It may be a serious political risk before its own electorate in a democracy if the government decides to pay foreign obligations. In the case of dictatorships, this problem may be less critical, but dictatorships also have to consider domestic public opinion.

In case there is a considerable quantity of free international trade, a government can nearly always pay obligations from the economic point of view. It can always buy the exchange of its creditor, and the result will be a diminution of the value of its own exchanges. It will become a very good place in which to buy commodities, and, consequently, according to the traditional theory of international trade, a movement of goods from the debtor to the creditor country will develop from the very process of paying. But where there is a condition of increasing tariffs to prevent goods coming to the creditor country where quotas and other arrangements are enacted with similar purpose, then it may be that the economic law will not work. In such circumstances, if the debtor country attempts to buy the exchange of its creditor, the result will be that its own exchange will depreciate so much that its entire financial system will be demoralized. I am saying this to emphasize the close relationship between the commercial policy of a creditor and its credit situation. It was recognized by the great creditor nations of the 19th century that they had to allow goods to flow into their country if they were going to collect interest on their credits abroad. The United States has not fully realized that relationship between its commercial position and its financial position. We have had a high protective tariff. We feel we must continue that policy, but we make it exceedingly awkward for debtors to pay us their debts.

I am not going to offer a specific remedy. I think if the United States is to continue as a creditor country and is going to collect interest as it comes due, it will have to realize that its commercial policy must be adjusted to this situation. It is common knowledge that international debts, when they come due, and interest on such debts, eventually must be paid in goods or services. That means that the creditor country has to have an unfavorable balance of trade, considering both the visible and invisible items and relations with other countries. We do not like to have an unfavorable balance of trade. We must realize, however, that we have to bring in more goods and services than we give out, if we are going to have any real returns from our foreign

investments. That seems to me to be the fundamental problem in this matter of collecting foreign debts.

The PRESIDENT. The Chair recognizes Mr. Eagleton.

Professor CLYDE EAGLETON. The proposals of Judge Manton were quite interesting and ingenious and deserve a good deal of discussion. I should like to raise two or three questions about them. In the first place, I wonder if I understood correctly; I thought that Judge Manton said that the Permanent Court of International Justice now has compulsory jurisdiction through which the United States could call before that court another state which had defaulted in the payment of its bonds. Perhaps I misunderstood that. I am sure the court does not have such jurisdiction, the United States not having signed the optional clause, nor accepted any form of compulsory jurisdiction.

I am not sure, again, that I understood Judge Manton correctly, but I understood him to say that the mere non-payment of a debt by a state amounted to a denial of justice. If I understood that correctly, I am sure that there would be a good deal of authority opposed to that statement.

But the point which interests me most lies in his proposal, which constitutes, it seems to me, an attempt to avoid the rule of local redress. The proposal, as I understand it, is that a governmental body should be set up, a corporation to which private individuals would turn over their bonds. Thus, the government would become the owner of the bond, and the government then being the owner of the bond could take up the claim directly as against the other state.

The very heart of the law of responsibility of states lies in the rule that local remedies must first be exhausted. I wonder if the state against which the claim was made would admit this machinery? Would it not say that the individual who purchased the bonds must still submit to the rule that local remedies must first be exhausted? I am not quite sure how far they apply in bond cases, but I rather think that the state would say to the United States, "You are attempting to avoid a fundamental rule in the responsibility of states, which is that the individual must first submit his claim to the local remedies of the other state, and you are attempting to avoid that by turning over to the national government the bond, making it your own claim; and we will not accept that."

I should like to add one final remark. While I sympathize thoroughly with the idea that individuals should be given rights in international law, and procedural rights especially, I rather imagine that the Permanent Court of International Justice would find it very inconvenient, as a practical matter. There would be an enormous amount of business if private claims were allowed to be put before the Permanent Court.

Mr. GEORGE A. FINCH. After all that has been said this evening in behalf of the protection of the bondholder, I hesitate to say anything, even by way of suggestion, that might cause the shadow of a cloud to pass over this glorious field-day celebrated for the benefit of that distressed gentleman.

But there is a phase of the question which I had hoped would be brought up under this topic, but which has not been mentioned, and I would not like to see the discussion close without it appearing that somebody at least had thought of it—and that is, to look at this question of foreign bonds a little bit from the other side, from the point of view of the peoples of the governments which have issued some of these bonds, particularly with reference to the conditions under which some of the bond issues were made.

I do not have at hand any definite figures to submit, but Judge Manton, I believe, suggested that there are about one billion five hundred million dollars in default. I understand that about a billion of that sum is attributable to bonds issued on this side of the Atlantic; and it is commonly reported that some of these issues were obtained by reprehensible methods and others in disregard of sound financial considerations. An experienced investigator who went to South America, reported upon his return that when one of these issues now in default was being sought by a certain government, which had already borrowed all the money that reputable banking advisers thought could be safely loaned to it, there were representatives in that capital of 22 American issuing houses, competing for another loan, which they ought to have known would be an unsound loan. As the result, the borrowing government got better terms at the expense of the private investor, and neither the security, the purposes of the loan, nor the safeguards for the proper use of it were what they should have been. At that time, the government referred to was under the control of a notorious dictator, and the people of that country were making strenuous efforts to get rid of him.

Now it may be all right to propose that we submit to the Permanent Court of International Justice, or to some other judicial tribunal, the legal questions involved in the terms of such bond issues, and the bondholder may be legally entitled to the amount of his bond; but it seems to me that there are other questions that ought to be considered in connection with the demand for payment of such obligations. They can only be paid by taxing the people of the issuing government, either directly or indirectly, and what is likely to be the effect upon the good relations between the people of our own country and the people of a country who have been deluged in foreign debt by a dictator whom they have overthrown, when they are asked to repay in full the sums loaned to him under the conditions which I have described?

And is our own government entirely blameless in permitting such conditions to grow and become a menace to good relations with other nations? I suggest that it may at least be charged with carelessness in allowing high-pressure financial salesmen to travel about the world with American passports in their pockets seeking opportunities to purchase these highly profitable pieces of colored paper, offered upon unsound financial conditions and questionable methods of accounting, and then coming back to the United States and offering them to the American public. In what capacity did these gentlemen act? Were they the representatives of the foreign issuing gov-

ernments, were they the representatives of the purchasers of the bonds, or were they merely international chameleons changing their representative capacity according to the side of the boundary upon which they happened to be operating for the time being?—but in any event collecting and pocketing their highly remunerative profits and commissions on the loan, and then stepping from under any further responsibility for the fulfillment of the obligations of the foreign government which they have induced the private investing public to buy.

It seems to me that the enactment of the Securities Act of 1933, which Mr. Thompson has so very carefully explained to us, is an acknowledgement that our government was delinquent in allowing this sort of thing to take place. If that Act had been on the statute books ten years ago, we would probably not have been in this regrettable situation. The principal blame for the existence of many of these defaulted loans must rest upon the questionable methods adopted by American banking houses in obtaining and selling them. Financial experts, experienced in international loans, have advised, and their advice is in the public records, against the lending of money to foreign governments for the maintenance of armies and navies, and for the construction of unproductive public works. If our bankers disregarded this advice, and loaned the money of American investors to irresponsible governments to be spent for such purposes, there may be a legal responsibility for its repayment in full under principles of international law which we would not care to see ignored; but there are also in the problem of collection these elements of fairness and equity involving the good relations of nations which it is not possible to submit to the Permanent Court of International Justice, or to any other judicial tribunal.

It seems to me that the best thing we can do is to attempt a friendly settlement of all these financial messes of the past. It is fortunate, indeed, that there is at the head of the Council of Foreign Security Holders under the Securities Act, a man who has had much experience as legal adviser in our State Department and as Ambassador to one of the Latin-American countries. These defaulted loans should be settled in an amicable way, on the best terms obtainable, through the good offices of that organization, as the best way out of a deplorable situation; and then let us stand back of the Securities Act and see that this sort of thing does not occur again in the future.

Professor JESSE S. REEVES. Mr. Finch has listed a great many reprehensible acts which he says cannot be adjudicated by any principles of law in the court. Would he include among those reprehensible acts the situation where a government makes many issues of bonds payable in gold of the then standard of weight and fineness, and thereafter reduces the value of the standard from 100 to 59 and a fraction cents? What about the bondholders who purchased certain bonds of a well-known republic, who are now living in another country, or, for instance, the situation where a country

promises to pay in perpetuity a large sum of money in the way of a rental for canal purposes, the standard of value at the time the contract was entered into being well-known throughout the world, the standard of value having been fixed as the result of a vast political campaign in 1896? What moral or ethical or legal question is involved when perhaps that country tenders to the lessor the amount of the annuity in a standard reduced from 100 cents to 59 and a fraction cents?

Mr. FINCH. I am very glad Professor Reeves asked that question, for I would not have it appear that I would exclude my own government from any of the criticisms I have made; but I would like to pass on to Judge Manton the question as to whether he would include that proposition in his proposal to leave such questions to the Permanent Court.

Judge MANTON. I should think they might be put up by way of defense in the international court.

Mr. EDWARD DUMBAULD. After the discussions this evening from all the speakers which, I believe, are on a higher intellectual level than at any meeting of the Society which I have ever attended, it would be futile for me to attempt to add anything with respect to the merits of the subject for discussion, but since Mr. Reeves has gone into the humorous aspects of the situation—

Professor REEVES. (Interposing) It was unconsciously so.

Mr. DUMBAULD. (Continuing) I would like to add a story of my own which took place at The Hague one day when a young Hungarian chap was discussing South American loans, and he said it was the practice of those countries never to pay anything until they wanted to borrow some more. Then a peculiar old man present said, "Well, I think that the lender should lend the money only upon the express condition that it be repaid."

The PRESIDENT. Is there a desire to continue the discussion further? It is a quarter of eleven.

Professor EDWIN M. BORCHARD. Judge Manton will probably think he has fallen into a den of super-critics. At all events, he has the satisfaction of knowing he has raised the intellectual level of these discussions. He will not mind, I hope, if we are as critical of him as we are of ourselves. The suggestion that a loan becomes international because the private citizen hands a bond to his government for collection is, I think, quite new. The suggestion that the State Department should become the collection agency for disappointed bondholders is also a resurrected innovation, and I can conceive of that policy doing serious damage to our relations with a good many countries, particularly on this continent.

I have never thought that the mere non-payment of a foreign bond could be called a denial of justice in any technical sense. I do not believe that the United States Government should be asked to do for the holder of a foreign bond what it would not do for the holder of a domestic bond. The theory of bond purchase has been that the buyer purchases with his eyes

open. He may think they are more open than in fact they are. But the theory is sound. I do not believe that the United States Government should become the guarantor of its issuing houses, or even of the debtors' delinquencies in that respect.

There are certain limitations and conditions on which the government will espouse the claim of a bondholder, but they are pretty well fixed with a design to prevent international relations from becoming too hostile. It impresses me that if Judge Manton's ideas were carried out in practice, we would have more hostility than we have today, and I hardly see how we can stand more. I should question very much whether you would do the Permanent Court of International Justice any service by saddling it with this very uncomfortable obligation of declaring receiverships of insolvent countries and then supervising the receiverships. That would mean how much debt governments can stand, what they can spend, for what purposes, how much they should set aside for the liquidation of the defaulted loans. That would mean, perhaps, enforcing machinery of all kinds. I am afraid that the default might occur in the Permanent Court. We might lose the Permanent Court.

I am a little afraid that the suggested plan carries practical implications which deserve greater consideration. As Dr. Rowe said, when Mr. Fenwick demanded that we stop the Paraguayan-Bolivian war, "How are you going to accomplish that without considerable complications?"

I am inclined to think that the suggestions made by Mr. Nebolsine and Mr. Turlington were of a practical character and can do much toward working out a feasible way to ease and adjust defaults. The difficulty in these cases and the reason they go to diplomatic or other controversy is rarely because there is a dispute on what is owed. That usually is not in disagreement. The difficulties involve financial capacity, priorities among creditors, the value of security, and the workability of a plan of adjustment.

Perhaps Judge Manton meant that the Permanent Court should become a bankruptcy court to determine how much should be paid on the loan, but I am a little afraid both of some of the legal theories advanced and of the execution of the proposal itself.

Mr. CHARLES HENRY BUTLER. The idea of Judge Manton is not new. It was tried out forty years ago, when the States of New Hampshire and New York passed similar acts, that citizens holding bonds of other States should transfer them to the respective Secretaries of State, and the Secretary of State, on behalf of the State, should bring an action in the Supreme Court of the United States, thus getting jurisdiction of a suit between the States. I can not see any difference between that and Judge Manton's proposal, but the Supreme Court of the United States held in New Hampshire and New York *v.* Louisiana (108 U. S. 76), that for the purpose of jurisdiction the bond was the same in the hands of the Secretary of State as it was in the hands of the individual holder, and that it was not an action between States but was an

action simply brought by an agent of the bondholder against the other State, and the cases were dismissed for want of jurisdiction. There would be no possibility of creating any such basis of jurisdiction. The United States would be acting as the agent for private bondholders to do what the States of New Hampshire and New York tried to do and the Supreme Court said that it was not a fair deal, in order to get jurisdiction of the court.

Mr. DENYS P. MYERS. Bonds have been going sour for a good many years, and I have not heard tonight any reference to the machinery that has been provided, well established, at least, in England, for the handling of this kind of thing. The Corporation of Foreign Bondholders has been referred to, but its operation has not been mentioned at all. I am not aware that the Corporation of Foreign Bondholders in about seventy years of operation has ever had occasion to call upon the courts for anything, except possibly to rule on a point of law incidentally to a bond settlement. The corporation has been fairly successful in sweetening sour issues or reducing them, and very generally has reduced them.

At one time, the Republic of Honduras had about $70,000,000 worth of bonds outstanding; by the time they had passed through a committee and been reduced, they were allocated at about $4,000,000, so the kind of thing that Mr. Finch was referring to is not new or novel. All that is happening is that we are new parties to it.

It seems to me that the present law has very largely eliminated some of the bad practices. A few years ago I had a typewritten sheet showing the spread on a number of foreign bond issues. They ran all the way from five, to twenty-two, twenty-five and twenty-seven per cent. I was talking with an experienced investment banker about it and he asked to see the list. He looked down it and said, "Well, if we took any of them we would want that kind of a spread too." There was at least one instance where bonds were bought by the investment bankers at 73, and, I think, they were sold at 95 to the public. That kind of thing was running riot in those days; it is the sort of thing that justifies reductions.

When bonds go sour, it has been customary to appoint protective committees. There has been a good deal of a "racket" in that activity in our country. Two or three years ago you could not pick up a newspaper without finding two or three more protective committees announced. Those committees customarily called for the deposit of bonds and charged the bondholders some percentage for what they could get out of it in the general liquidation. Now, we have this council operating with the blessing of the government, at least, and the function of protection ought to be operated effectively and ably; it ought in the long run to pay its own way through a small tax against the bonds.

In all probability, that function will involve a reëxamination of the bond issues, with a view to reducing them either in principal or interest to a point where the issue itself can be liquidated. The idea that, just because

once upon a time a bond was put out at a given face value, it must be liquidated, despite anything, at that amount, is not one that the financial world in the last hundred years has found to be at all feasible. Bonds are always going sour. We have a job lot of them now, and it seems to me that the council that now exists can do an excellent job within the field of finance without any calling upon the courts, unless it is to determine a point of law or legal procedure in clarifying a situation.

The PRESIDENT. The Chair declares that it is time to go to bed. We will now adjourn until tomorrow morning at 10 o'clock.

(Thereupon, at 11 o'clock p. m., the session adjourned to meet again at 10 o'clock a. m., Saturday, April 28, 1934.)

## FIFTH SESSION

**Saturday, April 28, 1934, 10 o'clock a. m.**

The session convened at 10 o'clock a. m., President JAMES BROWN SCOTT presiding.

The PRESIDENT. Ladies and gentlemen, the session is open. The first item upon the program is the conclusion of the preceding discussions. Is there anyone present who desires to discuss any of the papers which have been presented?

Professor PHILIP MARSHALL BROWN. I would like to make one observation for the record, not that what I may say is of importance, but it has seemed to me desirable to express the thought, that perhaps the excellent papers of last night displayed an undue solicitude for the unwise investor. I speak a little feelingly, because of an experience in Central America, where I had a very trying case of default of payment of foreign bonds held by the Council of Foreign Bondholders in London. I am not prepared to make any charges against that institution, but my observation leads me to make this comment, to sound this warning, that any association of that sort, for the protection of bondholders, may in itself turn out to be something of a speculative proposition. Furthermore, I cannot quite see why we should seek to devise any method of protecting the simple-minded investor from unwise investments. Why deprive the American people of their chief joy of making foolish investments? There are plenty who love to make foolish investments. If they will buy, as I have seen them buy, bonds placed by certain cities in Germany, which are not adequately protected in any way, I cannot see why it should be the concern of our government.

When in Germany last summer I saw a beautiful municipal bathing pool. A German friend pointed it out and said, "We made that pool with money we borrowed in the United States." They and other nations will borrow. Oil wells and other institutions in this country will get money for purposes which are honorable, if you wish, but which are not really wise investments. I wish seriously to raise this question: Why should we show so much solicitude for the unwise investor?

Another thing; are we going to ask that protective measures should be taken, of such a nature that virtually it would amount to a fool's index of investments abroad, an index which would mean that you would say this is all right because the United States Government is clearly behind it? Or, here is a list of things you had better not go into, because they have not been approved by the United States? It strikes me we are introducing the government into the financial field in a most undesirable way. I venture again to ask whether we are wise in showing so much solicitude for the foolish investor, who, it seems to me, must learn by experience, and often sad experience.

Mr. E. A. HARRIMAN. I have the highest regard for the opinions of the last speaker, but I should like to ask one question. Why should not the government protect the unfortunate and unwise individual who wishes to make bad foreign investments just as well as it undertakes to protect the individual who wishes to make bad domestic investments in raising wheat or cotton?

Professor BROWN. I shall try to reply, but it is a double answer. First of all, I wonder if my friend, Mr. Harriman, approves of this system of government intervention in industry in this country. Personally, I deplore it. It may be a necessity for the moment, but I must say, while not an economist, I was not brought up to believe that it was sound economy to pay a man for doing nothing, to pay farmers for not planting cotton.

The PRESIDENT. The government would soon go to pieces.

Professor BROWN. That we should pay the farmer for not planting his crops is the principle to which I do not subscribe. As for protecting people at home or abroad from the results of their own unwisdom, I do not think it can be done. That is a matter of human nature that will still find an opportunity to gratify its desire for foolish acts. Rather than have a paternalistic system at home, I would say that we should grow out of the state of tutelage and learn, as other nations have learned, by actual experience.

Professor GEORGE G. WILSON. May I raise a question about the point which Mr. Harriman has just made, which runs something like this: That the United States has jurisdiction over American property in a way which it does not have over these foreign properties upon which securities are issued.

Mr. HARRIMAN. May I ask the last speaker when the jurisdiction of the United States became a matter of personal jurisdiction over its citizens in instructing them what they shall do, how they shall invest, what they shall raise in the way of crops, what they shall charge for the work they shall do? Is it not a matter of personal jurisdiction, rather than jurisdiction *in rem* over foreign property?

Professor WILSON. I should say that that is the case, but the various alphabetical systems which we are devising do not apply extraterritorially.

The PRESIDENT. Is there any further discussion, gentlemen? It is open to full and free discussion.

Mr. GEORGE A. FINCH. I would like to suggest that there is a difference between the acts of the government in its attitude toward the relations of its citizens to governments abroad and what its relations may be to its citizens in the United States. I think that accounts for the situation in which we find ourselves and which we are trying to remedy by the Foreign Securities Act which was discussed last night.

Of course, we all know that private industry is supposed to look after its own interests. But we also know that our investment business is so extensive and so complex that the investor has developed the habit of relying upon the good name and reputation of persons with whom he may be dealing, and when the party of the second part happens to be a foreign government there is an

additional reason why he may feel he is safer in investing his money; and the difficulty of our present situation has been that we have allowed our own citizens, by their diffuse characters in representing foreign governments in obtaining these loans and then coming back and unloading those bonds on the market, to occupy a position where it has been easier to impose upon the American investor.

I doubt, for instance, in the case Professor Brown cited, that the banking house in the United States when floating that loan stated that the loan was to be used to build a public bathing pool. I think if that had been stated, there would not have been many people to invest money in a bathing pool in Germany. It was issued as a loan of the German Government, or of a department of the German Government.

Professor BROWN. By a municipality.

Mr. FINCH. By a municipality, then; and it was no doubt accompanied by a very imposing table of statistics showing that this municipality had never defaulted on any of its loans. That is the situation which I think our own government should be concerned about, to prevent that sort of misrepresentation in the United States. I think if the government had been alert and had had the proper regulations in connection with American banking and investment houses, doing business abroad, under which there could have been some measure of control of the kind of representations that were made here when the bonds were offered, the sort of thing mentioned by Professor Brown would not have occurred.

I think we have made a good step in bringing the dealers in foreign securities within the scope of the Securities Act, and requiring them to place on file the proper information with which the investor can be taxed with notice, so that if he then wants to invest his money, he can apply to this organization and get the correct information. Then, I think, you would be justified in saying *caveat emptor*. I do not think we were justified in saying that in the past. When you ask a man in Kansas to buy a bond, the proceeds of which are to be used in South America, and allow the representative of a house in Boston which happened to be interested in floating the bond—

Professor BROWN. (Interposing) How about the house in London?

Mr. FINCH. I am not referring to British houses; I am talking about American investment houses.

Professor BROWN. But some bonds were bought through British houses.

Mr. FINCH. That is a matter in connection with which I should say the British Government would do the same thing, as I am advocating for the United States Government; or, if I want to deal with a foreign banker, I take the full responsibility.

Professor BROWN. I should like to ask Mr. Finch if he actually believes that the United States Government should be put in the position of officially, by law, putting its approval or disapproval on investments?

Mr. FINCH. Absolutely not. There is not a word that I have said which

would indicate that that was in my mind. I do mean to say that we should control the business of investment bankers and investment houses and individuals to such an extent that our own people can get the necessary information upon which to rely in making a foreign investment.

Professor BROWN. Does not that put the United States Government in the position of approving or disapproving?

Mr. FINCH. No, sir; it requires the banker to file a statement in a public office somewhat as is done in connection with real estate transactions.

Professor BROWN. The American investor will consult that on the faith of the government.

Mr. FINCH. Certainly not. The government does not guarantee it; the government simply requires the filing of information, as when you go to a record office to look up a deed, you look up the record and there it is for your own decision.

Mr. CHARLES WARREN. I think, Professor Brown, that you overlooked one thing which was one of the impelling motives of Congress; whether rightly or wrongly, a large number of men in Congress believe that the United States had a certain responsibility for these loans. While the State Department may disclaim in a most emphatic way that the presentation of these loans to them and their saying that they had no objection to them, did not amount to an endorsement, I daresay a great many men in this country, including myself, can not see that very fine distinction, and Congress, undoubtedly, in framing the bill as it did to give some sort of protection to investors, felt that, regardless of the reiterated statements of the State Department, the United States did have some degree of moral responsibility. It was, to my mind, a very unfortunate situation, but it was a situation that was before Congress. We hope in the future no such situation will ever arise and that no such measure as this will ever be necessary again, but it is not a law devoid of some substantive reason.

Professor BROWN. Might I ask Mr. Warren a question? Is there a large element of policy involved, and whether the United States Government originally wished to have capital invested in certain countries?

Mr. WARREN. I think there is a large question of policy involved. I think in this measure there was also a large element of sympathy involved, based on the policy which the State Department adopted, and which, to my mind, was a very unfortunate policy. I do not think the State Department ought to have intervened in any way. I agree with you that the United States should not be responsible for foolish investments, but I think it placed itself in a position where there was a certain degree of moral responsibility involved.

The PRESIDENT. What is your pleasure, gentlemen? The topics are still open for discussion.

Mr. DONALD C. BLAISDELL. I was wondering whether Mr. Finch would be willing to elaborate the means by which an intermediate method, something halfway between complete control and complete non-control by the govern-

ment, could be set up and exercised. To my mind, it seems that we have a situation where we have to decide whether the government is going to place its tacit approval, if you will, upon American investments made abroad, by passing some such legislation as we have at the moment, or leaving the field of foreign investment completely free and allow the investment bankers and others interested to engage in it and have the American public their reservoir of capital, completely free from any statutory restrictions. Would you be able to elaborate that question?

Mr. FINCH. I have not made any such suggestion. I do not see the necessity for any such halfway methods. I am not at all suggesting that the government should assume any responsibility whatever in the way of guaranteeing the validity of these loans or their financial soundness. I think the other extreme which you mentioned is unthinkable, of allowing the situation to remain exactly as it has been in the past, of allowing the investment bankers to use the American public as they have in the past. I think that condition is unbearable. If that goes on long enough, we will not have a friend in any other nation. All I am suggesting is what appears in the Securities Act, namely, a regulation of the business of issuing foreign securities; of requiring, as I said, before these bankers issue foreign securities, the filing of certain information. The government does not guarantee that information.

Mr. BLAISDELL. Why not?

Mr. FINCH. They are supposed to file certain information, and if false information is filed, there is a civil responsibility to any investor injured by it.

Professor BROWN. Who is he responsible to, the government?

Mr. FINCH. I do not understand there is any responsibility to the government; it is the banker who makes the statement who is responsible. When you want to buy a bond, you have the sworn statement of the concern sponsoring it, with your remedies against them in case the statement is false or misleading.

Professor WILSON. Suppose the bonds are not underwritten by any American concern. Suppose they are advertised in *La Prensa*, of Buenos Aires. Somebody gets a copy of that paper and buys the bond advertised; is it any business of the United States?

Mr. FINCH. That would not be an investment in the United States, if somebody sends money to Argentina on the basis of such an advertisement.

Professor WILSON. You are thinking in terms of domestic matters?

Mr. FINCH. That is what the Securities Law covers. It is a law of the United States that I am discussing. It has no extraterritorial effect.

Senator ELBERT D. THOMAS. The remarks which I am going to make are not entirely germane to the discussion as it is now turning. That which has been said reminds me of what I often say to myself: The government seems constantly to be against itself. For no matter what it does in attempting to benefit the people, there are always those among the people who are able to take advantage; to use that which the government has done for

their own benefit, instead of for the general benefit. This is probably inevitable in a government by law. "Government by law" often means in practice a government through litigation. We, as teachers of law, should, in some way, create among those whom we teach a consideration for the necessity of interpreting law from the standpoint of the law's hope and aspiration, assuming that the law is to benefit rather than to take advantage of it in such a way as to do harm. In other words, to help in the administration of a given law so that the law will attain its purpose.

We have securities acts in the various States. The motive behind these acts was good. As many persons were imposed upon, these laws came generally as reforms. In their administration today, in order to protect the public, before a business concern can sell a security to the people of a given State it must obtain permission from a commission. That sounds very good, and it is very good. As a result of hard times we, paying attention to the companies which have failed, discover that such companies have been able to take the people's money by issuing some sort of statement which they strictly were not entitled to issue, but which they did issue. As a result of the governmental requirement, for example, "inspected by the state" was interpreted by the skillful salesman to imply "guaranteed by the state." Thus the very law which was passed to protect becomes the means of permitting even graver impositions.

When the State Department took it upon itself to decide which loans should be issued and which should not, it more or less opened to the unscrupulous an opportunity to sell something as having been guaranteed and sponsored by the Government of the United States. The problem remains, how may government control the unscrupulous?

While every investor needs a nurse, the government should be used not so much to act as a nurse for the investor as to curb the unscrupulous who will take advantage of those persons who need nurses. How can we do this? In our little way we can everlastingly teach the spirit behind the law, the purpose behind the law, and, even though we are opposed to some way in which the law may turn, we can keep from being like those who attempt to ruin an effort of the government by refusing to become sticklers for the absolute letter of the law. Let us interpret law in keeping with the purpose which initiated it.

All I have said means nothing to you because you have agreed with my ideas from the beginning. But still we have the same problems with us. In this new job of mine I am reminded almost daily that this country is suffering from the most stupendous case of sloganized thinking that civilized men ever endured. The radio, the telegraph and fast moving news agencies must be given some credit for this. The chief credit, however, must go to those "I am my brother's keeper" organizations which attempt to control sentiment for selfish persons. Some people call them propagandist groups.

We had before us the other day one of our country's greatest lawyers. He was before us last spring and he told us then the government was going to

the dogs if we passed a certain law. We passed the law. Now he comes to us to say that the government is going to the dogs if we pass another law. And the argument he uses is that all of the good effects of the law which we previously passed and which he had said would send us to the dogs, will be ruined if we pass this law. The gentleman is paid $150,000 a year, but apparently he has no social memory. He took it for granted that those of us who listened to him had no memory at all. Probably I am mistaken, for he undoubtedly knew that it was those who paid him the $150,000 a year who had no memory, for the only people I think he fooled were those who paid him. But on second thought, I am afraid I am the only one that is fooled, for a gentleman who can talk somebody else into paying him $150,000 a year will use both the laws referred to, to his clients' own purposes, and it will turn out that he is probably not overpaid.

What I am going to say next is something which illustrates how our government works. This happened lately. I am bringing the incident up not in the spirit of criticism of anyone, but merely in an academic way. It illustrates the spirit of my remarks. I introduced a sympathetic and sentimental little bill in regard to the administration of the United States Court in China. It was merely a gesture. It provided that the Chinese code be used in our United States Court in and for China. That law seemed to be a terrible thing to someone in one of our greatest departments. It was opposed, and I received letters saying that the law was entirely out of order and that we must not do anything which might affect our extraterritorial status. The letters implied that our government was looking forward to the time when it would make everything lovely, but that we should not attempt to make anything lovely right now. A few weeks after the receipt of these letters, I was in my office and the telephone rang. The clerk of one of the Senate committees called me and said: "We want your approval immediately to a law which certain people down in the other end of town want passed this afternoon." I said, "What is the law about?" He replied, "It has to do with the powers of arrest in places where we have extraterritorial jurisdiction, and it is necessary that the law be passed this afternoon or it will do no good." I laughed and said: "You have my O. K., but you know from what I have said that I am opposed to this kind of legislation. Watch the results." That law was passed that afternoon. An old gentleman was arrested in some Near Eastern place and immediately the effects of that kind of legislation were discovered. As soon as the news of the passage of the law reached the Far East, an American there committed suicide. They captured Mr. Insull in the Near East and Mr. Julian committed suicide in the Far East. This law passed in haste was probably not *ex post facto,* nor was it actually retroactive in letter, but in spirit it partook of the nature of both. What happened was that the Congress of the United States, for the purpose of "getting" a particular man, failed to be thoughtful of the fact that the law would cover many others, as it must of necessity be general in its application. The "get your man" type of law is

probably the worst kind of legislation, because it is always emotional. Think of it. This law was sponsored by the very persons who were so cautious about allowing any sort of discussion in regard to extraterritorial rights! There is no use having feelings about these things, for what I have said merely reflects a Democracy functioning, a government, in reality, acting in a very purposeful way. But surely there was not that thought displayed that should be indulged in by those persons who believe in a government functioning through and by law. A government by law implies a government by thoughtful persons.

The PRESIDENT. If there be no desire for further discussion of previous papers, we shall pass to the next item on the agenda.

Miss BESSIE C. RANDOLPH. May I make a statement of fact?

The PRESIDENT. If there be no objection.

Miss BESSIE C. RANDOLPH. It is simply this: Yesterday morning, in the discussion of the treaty-making power, where the treaty-making power leaves off and the exclusive power of Congress begins, we had some discussion of the different cases, judicial decision, in which an attempt had been made in the past to clear the matter up. I found out, by discussion with several people afterwards, that these judicial decisions, almost every single one of them, were in the municipal courts and were merely decisions on the treaty as a statute, and not the treaty in its character as an international contract. There is a world of difference between those two. The chief difficulty comes with the construction of the treaty in its status as an international contract, and not as the law of the land. The popular mind confuses the two adjudications.

## BUSINESS MEETING

The PRESIDENT. The Chair recognizes the Secretary, Mr. Finch.

The SECRETARY. The Council at the meeting on Thursday took a number of actions which it seems wise to report to the Society for its information and for the record, and the Chairman has asked me to do that.

I would report that, as usual, the Council received the formal reports of the Secretary, the Treasurer, and the auditors, which were approved and accepted and which will be printed in the annual *Proceedings*. It also received the report of the Editor-in-Chief and the Managing Editor of the *American Journal of International Law;* it received reports of the committees, on honorary members, membership, annual meeting, State Department publications, etc. The Chairman of the Committee on Honorary Members will now submit its report to the Society, and the chairman of the Committee on Codification deferred his report until this morning.

The Council discussed the relations between the Society and the American Bar Association and the American Law Institute, with particular reference to the practicability of having the Society meet somewhat around the same time as the Section on International and Comparative Law of the American Bar Association. The Council decided to appoint a committee on that

subject, and the chairman appointed as the members of that committee Mr. Frederic D. McKenney, Miss Bessie C. Randolph, Professor Manley O. Hudson, Mr. Philip Marshall Brown and Mr. George T. Weitzel.

The Council also received a statement from Professor Jessup in regard to the work of the Joint Committee on State Department Publications. This committee of the Society worked jointly with a committee appointed by the conference of teachers of international law which met last year. As a result of Mr. Jessup's recommendations, the Council decided that the Society should appoint a standing committee on State Department Publications, and the appointment of that committee will come before the Council when it meets following this session of the Society.

The Council also adopted Mr. Jessup's recommendation of appointing a small *ad hoc* committee to confer with Dr. Rowe in regard to Pan-American documentation, the reason for that action being the passage of a resolution at Montevideo by the Seventh International Conference of American States bearing on that subject. As the members of that *ad hoc* committee, the Chairman has appointed Dr. Herbert Wright, chairman, Mr. Wynne, of the State Department, and Mr. Denys P. Myers, of the World Peace Foundation.

The Council also considered the question of the Society becoming a member of the American Council of Learned Societies. The Council authorized the Society to make such an application, and the Council this morning will be called upon to designate two delegates and two alternates to the American Council of Learned Societies.

The PRESIDENT. Gentlemen, you have heard the report by the Secretary of the business meeting of the Council. Might I make a single observation which, I think, may be of some interest to the members present. The Governing Board of the Pan American Union, from time to time, requests the Carnegie Endowment for International Peace to come to its aid. This time, by unanimous resolution, they have requested us to prepare the records of all the American conferences, the conferences of the American States, between the Congress of Panama and Mr. Blaine's first conference at Washington, and we are undertaking that labor. At the same time, the Governing Board of the Pan American Union has requested us to prepare the official texts, etc., of the conference at Montevideo. When that is done, there will be a series of volumes, beginning with Panama and ending with the seventh of the Conferences of American States at Montevideo. That is a form of documentation which perhaps will be of interest to you, and we hope to begin at once in doing our part.

The next item of business is the report of the Committee on Codification.

### REPORT OF THE COMMITTEE ON CODIFICATION

Professor JESSE S. REEVES. Mr. Chairman, in making the annual reports to the Society on behalf of the Committee on Codification, I have endeavored to indicate briefly whatever developments there have been of

an official nature during the year, and what progress has been made looking toward ultimate codification by American unofficial agencies.

During the past year, no step has been taken under the auspices of the League of Nations looking toward the carrying on of codification under its auspices. As has been noted heretofore, the League of Nations has abdicated its initiative in the process, and has now left the initiative to individual states to resume the work of codification where it was left off at the conclusion of the Hague Conference of 1930. So, we have nothing new from that quarter.

On the other hand, the official processes of codification under the auspices of the Pan American Conferences have added another important chapter as a result of the work of the recent conference, the Seventh Conference of American States held at Montevideo. A series of draft conventions was presented to that conference, and these drafts were signed as conventions. The preliminary work upon the drafts was largely that of the American Institute of International Law, although in the ultimate *redaction* of the texts presented to the Montevideo Conference, other drafts were used as bases of discussion. Among the conventions signed were those upon extradition, nationality, political asylum, and on the rights and duties of states. These conventions, added to those signed at the Sixth Pan American Conference at Havana in 1928, together form an impressive body of codified international law of the Americas.

By resolution of the conference at Montevideo the method of preparation for codification was changed from that adopted at the sixth conference. The Inter-American Commission of Jurists, which met at Rio in 1927, was continued by the conference at Montevideo, but in addition there was set up by resolution a new and complicated mechanism for preparation. What initiative will be taken for setting in motion this complicated machinery, it is too early yet to report.

Turning now to unofficial activities, the work heretofore reported upon under the auspices of the so-called Harvard Research in International Law has gone forward during the past year. Three topics have been engrossing the attention of this group; one, the subject of extradition; two, that of the jurisdiction of states to punish for crime; and, three, treaties. In all three of these, the work has gone well toward completion. It is expected that it will be completed by February next, and that, as was the case in earlier draft conventions set forth by this group, the results will be printed as supplements to the *American Journal of International Law*. The three of them will probably be published within the next two years. What the Research in International Law may be able to undertake after the completion of its present labors, I am not now advised.

This, I believe, Mr. Chairman, is all that the committee has to offer by way of report, further than to say that notwithstanding the apparent subsidence of active interest in world codification, interest and activity in the western hemisphere continues, and that whatever may be done officially, the

work of members of this Society in connection with the Research will constitute an important chapter in the history of the codification of international law. While the American Society of International Law has no funds at its disposal to carry forward the work of codification, each member of the codification committee is actively interested and engaged in the work of research in international law, as directed by Professor Manley O. Hudson. This is a standing committee of the Society, and I assume that with this report of progress, the Society will continue the existence of the committee as a standing committee.

Professor PHILIP MARSHALL BROWN. As a member of this committee, I would like to avail myself of the privilege of expressing a point of view in the nature of a minority dissent, with respect to the work that has been going on under the so-called Harvard Research. It has been my privilege to be a member of that committee, and it has been a real intellectual joy to participate in its meetings, as well as good fellowship, but candor compels me to state my serious doubt as to the method being followed by that committee. It has inherent defects which we in this Society should take into account. I have attempted in an editorial in the *Journal* of April to adumbrate these points of view. I would like to make them more precise at this time.

First of all, the word "codification"; a great many people have been legitimately afraid of codification, notably our friend John Bassett Moore. If by codification we mean an attempt to do something like the Code Napoleon, I should say such fears were justified. If we have an idea that we are going to take a certain subject in the field of international law and make a complete code of it, I should say we are in grave danger. That is not in harmony with the historical origin of international law or its evolution. Frankly, my first objection is that it savors more of law-making than anything else. Our discussions have turned, as in a legislative committee, on questions of *if* and *when*—

The PRESIDENT. (Interposing.) Professor Brown, do you think this comes within the purview of the Society? The Harvard Research Committee is not a part of the Society.

Professor BROWN. I think you will see my point of view.

The PRESIDENT. I think any criticism made of the Harvard Research in International Law should be made to the Research Committee itself.

Professor BROWN. I think you will see my point of view as a member of this Society, if you will allow me to continue. I am sure Mr. Hudson will not take it as a personal observation. I am speaking as a member of this Society, with an idea of our function as a Society. What I am trying to point out is this: If we find this method does not produce satisfactory results, perhaps the Society should itself, if it could find funds, elect to carry on the task of codification.

The PRESIDENT. That is a different matter.

Professor BROWN. My first objection is that we are proceeding along

the line of statute making. The second objection is that continually in the discussions of these measures we have been thinking of the point of view of our government. I maintain that as jurisconsults we are not concerned with the passing opinions and changing policies of governments. It is not a question of whether the particular principle we attempt to embody in the report is acceptable or not to the State Department. It is a much deeper question. It is a question of what is the principle which is involved, of what principle may be applied. It is not a question of the consent of our government.

The third objection is that we have been thinking too much in terms of diplomatic conferences of states. When we get these codes before diplomatic conferences, it is a question of legislation, whether we can get the consent of another nation to this proposition or that. I maintain that is not in accordance with the tradition of international law, in its development, and I would suggest as the proper method, the ideal method of codification, that which has been followed for some fifty or sixty years by the Institute of International Law, which has its center at Brussels. You will notice in the resolutions of that body there has been no attempt made to anticipate every possible difficulty that may arise. General principles are laid down with the idea that if clearly enunciated they will be naturally worked out by judicial processes or otherwise. Therefore, the time may come when we, interested from the standpoint of pure science, from the purely juristic point of view, may feel that we ought, as a society, to give regard to the method of the Institute of International Law and deal with the main principles, and not have in mind the lesser details (*de minimis non curat lex*); nor should we be concerned with the passing opinions of any government, whether our own or of any other.

I desire to put this on record in the most friendly way possible. I think that we may properly praise the work being done. Our main object ought to be to see that international law is advanced, and advanced in a wise scholarly way.

The PRESIDENT. The Chair is of the opinion that discussion of this kind should not continue unless there is a formal proposition made that the American Society of International Law should undertake the codification of international law. The Harvard Research is a private organization having nothing whatever to do with the American Society of International Law. No member of the American Society of International Law, as such, takes part in its proceedings. They take part as individuals and not as members of this Society. Therefore, I feel obliged to rule that the criticism of the method pursued by the Harvard Research Committee, whether that criticism be unjust or just, is beyond the jurisdiction of this Society.

Professor BROWN. May I say in that case, your ruling should apply to the report of the chairman in which he referred definitely to the work of this committee.

The PRESIDENT. He was giving an account of the progress of codifica-

tion during the past year, and that is one thing. I think it is another thing to single out an organization and to criticize it, because it is not before us and it is not our business.

A VOICE. I move the adoption of the report of the Committee on Codification.

The PRESIDENT. It is moved that the report of the Committee on Codification be adopted, received and placed on file. All in favor of that motion please signify by saying aye. It is carried.

The next item is the report of the Committee on Honorary Members.

REPORT OF THE COMMITTEE ON HONORARY MEMBERS

Professor MANLEY O. HUDSON. Mr. Garner asked me to express his regret that he found it necessary to leave the city before this report was called for, and he asked me to present it in his behalf, and report that the Committee on Honorary Members has no recommendation to make.

The PRESIDENT. The report of the Committee on Honorary Members is before you for consideration. All those in favor of its acceptance please signify by saying aye. It is adopted.

The next item is the report of the Committee on Nominations. Is the chairman of the committee present?

REPORT OF COMMITTEE ON NOMINATIONS

Mr. GEORGE T. WEITZEL. The Committee on Nominations presents the following report: Honorary President, Elihu Root; President, James Brown Scott; Honorary Vice-Presidents, Newton D. Baker, Philip Marshall Brown, Charles Henry Butler, Frederic R. Coudert, James W. Garner, Charles Evans Hughes, Cordell Hull, Frank B. Kellogg, John Bassett Moore, Jackson H. Ralston, Leo S. Rowe, Henry L. Stimson, George Grafton Wilson, and George W. Wickersham. Vice-Presidents, Chandler P. Anderson, Manley O. Hudson and Jesse S. Reeves.

Executive Council to serve until 1937, Tyler Dennett, Frederick S. Dunn, Karl F. Geiser, Green H. Hackworth, Philip C. Jessup, Arthur K. Kuhn, Clarence E. Martin and Quincy Wright.

I move that we proceed to the election of officers and that the persons just mentioned be considered as placed in nomination for the respective offices.

(The Secretary hereupon assumed the chair.)

Professor JESSE S. REEVES. I would like to ask if there is a constitutional limitation as to the number of Honorary Vice-Presidents.

The CHAIRMAN (Mr. Finch). The Constitution allows the Executive Council to fix the number of Honorary Vice-Presidents.

Professor REEVES. Has it done so?

The CHAIRMAN. The Executive Council has kept the present number for several years. Two years ago there was a proposal that the Executive

Council should consider enlarging the number of Honorary Vice-Presidents. The Executive Council, following its customary practice, referred that question to the Executive Committee. The Executive Committee held a meeting, considered the question, and decided not to enlarge the present number of Honorary Vice-Presidents, but to reform, possibly, the membership of the Honorary Vice-Presidents. I think we are now limited to the number of Honorary Vice-Presidents the Society has. Are there any other remarks upon the report of the Committee on Nominations? If not, the Chair will entertain an appropriate motion.

Professor BROWN. I move that the report be accepted and that the Secretary be requested to cast the ballot of the entire Society for the nominees.

The CHAIRMAN. It has been moved and seconded that the report of the Committee on Nominations be accepted, that the nominations be closed and that the Secretary cast the ballot of the entire Society for those recommended by the committee for the respective offices. All those in favor of the motion please signify by saying aye. Contrary, no. The motion is carried.

The Secretary has cast the ballot as directed.

I shall be very glad if Dr. Scott will resume the Chair, and accept the gavel of this Society for another year.

(Dr. JAMES BROWN SCOTT resumed the Presidency.)

The PRESIDENT. Let me, in behalf of the members of the Society who have been elected to these various offices, express their appreciation. As for myself, I am but the servant of the Society from the first day of its organization to the present moment.

We now come to miscellaneous business.

REPORT OF THE COMMITTEE ON PUBLICATIONS OF THE DEPARTMENT OF STATE

Mr. PHILIP C. JESSUP. May I submit the report which the Committee on Publications of the State Department made to the Executive Council?

I should like, with the permission of the Society, to file for the record of the proceedings a full report of this committee, in order that the progress of the work in connection with the publications of the State Department may be permanently available.[1] This report will continue the report by the committee in 1928. I believe, Mr. Chairman, that the announcement of the proceedings of the Executive Council was not wholly correct—at least it was not in accordance with my recollection of the action taken. The suggestion which was made to the Council was that an *ad hoc* committee in regard to the Pan American documentation be appointed, and that a standing committee on State Department publications be appointed. The action of the Council, as I recall, was for the divorcing of those two motions. The Council, according to my recollection, passed the motion in regard to the *ad hoc* committee dealing with Pan American documentation, and asked that the question of

[1] Printed herein, *infra*, p. 206

the standing committee on State Department publications go over into the meeting of the full Society this morning. Whether my recollection is correct or not, I assume that the full Society has the power to modify the action of the Executive Council. I should like to suggest action by the Society, and prefacing the resolution which I want to propose, I should like to say that when this work was initiated in 1928, our task was largely one of persuading the State Department that the scope of its publications should be enlarged. That work was successfully carried on. The task is no longer to persuade the State Department. The task is to finance the State Department, which is fully persuaded that it should carry on the work. Under the leadership of Dr. Wynne, Dr. Hunter Miller, and Mr. Carr, every effort is being made to secure from Congress appropriations adequate for this purpose. The task of the committee and of the Society at present is to bring to the attention of Congress and of the Bureau of the Budget our interest in this subject and the necessity which all persons feel for continuing the excellent progress which the State Department began in 1928 in this matter of publications.

When we began our efforts in 1928, the total appropriation for the Department of State for printing and binding was about $180,000. It rose in 1931 to a peak of $321,000, largely, I believe, through the efforts of the committees of this Society and similar societies which also interested themselves in the subject. The appropriation available for the next year is $107,000, which is seriously crippling activities of the State Department in the publication of *Foreign Relations* and the publication of various other documents.

I believe the Society should have a standing committee on this subject in order to present our interest to the proper committees of Congress or to the Bureau of the Budget as may from time to time be necessary, and to continue our coöperation with similar committees of other organizations, such as the American Historical Association and the like.

I move that the Society constitute a standing Committee on Publications of the Department of State; that the President of the Society be authorized to appoint the members of this committee in its origin, and that subsequently, as a standing committee, its membership be filled in accordance with the procedure adopted for all standing committees of the Society, and further, that the chairman of the committee, if it be constituted, be authorized to add individuals to the committee for specific purposes, as in his discretion may seem desirable and necessary.

Professor BROWN. I am not quite clear of the difference between the proposed motion and that adopted by the Council.

The PRESIDENT. The Chairman was not present at that time; I was obliged to leave before it was reached.

Professor JESSUP. I think that the motion is substantially the same as that which was before the Executive Council; that is, it calls for the appointment of a standing committee. The difference, perhaps, is in the constitution of the committee, and the point of giving the chairman of that com-

mittee power to add to its membership if occasion arises; for example, if it becomes necessary to appear before committees of Congress, to bring in additional members who would be particularly valuable for that purpose.

The PRESIDENT. You have heard the motion; if there is no further discussion, all in favor will say aye; contrary minded, no. It is carried.

### MISCELLANEOUS BUSINESS

Professor WILLIAM I. HULL. Mr. President, with your permission, may I return to the report of the Committee on Codification of International Law? I have no desire whatsoever to appeal from your decision in regard to Mr. Brown's remarks, but it has seemed to me that since a standing committee of this Society on the question of codification has been appointed, the discussion of all aspects of that question would be germane, in the annual meeting of the Society. I am sure that we are all desirous of ascertaining the very best possible means of promoting the codification of international law. In view of your ruling as to discussion of the question here this morning, may I suggest that we should recommend to the Editorial Board of the *Journal* the further discussion of that question which Mr. Brown has raised. The points which he made seem to me to be very well worthy of consideration. I have not the slightest doubt that Mr. Hudson and his colleagues can meet the points which Mr. Brown has raised. I believe it would be very helpful to the members of the Society and the readers of the *Journal* if our Editorial Board will pursue a discussion of that question. I understand that Mr. Hudson is a member of our standing committee and is the head of the Harvard Research.

The PRESIDENT. Gentlemen, you have heard the motion made by Mr. Hull. Mr. Hull, will you please state the motion?

Professor HULL. I move that the Editorial Board of the *Journal* be requested to take into consideration the desirability of the further exploration of the best means of promoting the codification of international law.

Professor QUINCY WRIGHT. Are we to understand, if the motion prevails, that the Editorial Board is directed by the Society as a whole to undertake the editorial discussion of this subject?

Professor HULL. It is merely recommended that it do so.

The PRESIDENT. Might the Chair ask a question,—what would be the function of the Editorial Board? It discusses, and what is the result of the discussion? In what way is the Editorial Board concerned with the matter? The Editorial Board edits the *Journal*.

Professor HULL. Would the Editorial Board not have the privilege of inviting editorials upon that question?

The PRESIDENT. They should without the resolution.

Professor HULL. That was the purpose I had in mind. I think it would be helpful if we could get a frank discussion of the method being pursued in the codification of international law.

The PRESIDENT. A suggestion made to the Editorial Board to bring into the *Journal* discussion of the methods of codification would be one thing, but a mere discussion of the subject irrespective of any participation in the matter would seem to be wide of the mark.

Professor PHILIP C. JESSUP. I wonder, in view of Mr. Hull's remarks, if he would accept a modification of his motion. As I understand it now, it is a request to the Editorial Board of the *Journal* that they consider the inclusion of further editorial comments on the subject of codification, having in mind the points raised by Mr. Brown.

The PRESIDENT. Does Mr. Hull accept this interpretation?

Professor HULL. I do.

The PRESIDENT. The question before the house, as has been stated by Mr. Jessup, is that the Editorial Board will invite discussion as to the codification of international law. Is there any further comment? If not, all in favor will signify by saying aye; contrary minded, no. It is carried.

Is there any further miscellaneous business?

Mr. HERBERT WRIGHT. As chairman of the Program Committee of this annual meeting, I would like to record my thanks not only to the members of the committee, but particularly to Professor Jessup, and the members in Washington, and also to a number of other members who submitted suggestions, as a result of which the program was finally adopted.

The PRESIDENT. The Chair had in mind an expression of appreciation of the labors of the Program Committee, and if there be no objection, it will also be placed upon file. If there be no further business, the twenty-eighth annual meeting of the American Society of International Law stands adjourned.

(Thereupon, at 11.45 a. m., the twenty-eighth meeting adjourned, to be followed by a banquet at 7.30 o'clock p. m.)

## ANNUAL BANQUET

**Saturday, April 28, 1934, 8 o'clock p. m.**

THE WILLARD ROOM, THE WILLARD HOTEL

TOASTMASTER

JAMES BROWN SCOTT, *President of the Society*

SPEAKERS

Honorable WILLIAM PHILLIPS, *Under Secretary of State*
Mr. ALEXANDER A. TROYANOVSKY, *Ambassador of the U. S. S. R.*
Honorable FLORENCE E. ALLEN, *Judge of the U. S. Circuit Court of Appeals*
Mr. FREDERIC R. COUDERT, *of the New York Bar*

MEMBERS AND GUESTS

Ricardo J. Alfaro, *Minister of Panama,* and Señora Alfaro
Dwight H. Allen
Florence E. Allen
Bishop Julius W. Atwood
Mikas Bagdonas, *Chargé d'Affaires of Lithuania*
Mr. and Mrs. Philip Noel Baker
Dr. and Mrs. Victor Bator
Laura M. Berrien
João Antonio de Bianchi, *Minister of Portugal,* and Madame de Bianchi
George Boochever
Enrique Bordenave, *Minister of Paraguay*
Ira H. Brainerd
Grace H. Brown
Philip Marshall Brown
Fanny Bunand-Sévastos
Major Richard F. Burges
Charles Henry Butler
Julian R. Caceres, *Secretary, Legation of Honduras,* and Señora de Caceres
Arthur D. Call
J. M. Callahan
Melville Church
Ralph William Close, *Minister of the Union of South Africa,* and Mrs. Close
Wade H. Cooper
Ferdinand W. Coudert
Frederic R. Coudert
Charles A. Davila, *Minister of Rumania*
Gerald Davis
Henri De Bayle, *Chargé d'Affaires of Nicaragua,* and Señora De Bayle
Clarence W. DeKnight
Dr. Chester B. Emerson
Helen Essary
Augusta E. Finch
Eleanor H. Finch
Mr. and Mrs. George A. Finch
Wilbur S. Finch
Richard W. Flournoy, Jr.
Dean Franklin
Leonard M. Gardner
Hon. E. W. Gibson
Beatrice Golze
Mr. and Mrs. R. L. Golze
Manuel González-Zeledón, *Chargé d'Affaires of Costa Rica,* and Señora de González
Judge and Mrs. Clarence N. Goodwin
Mr. and Mrs. Joseph C. Green
Hon. Franklin Mott Gunther
Green H. Hackworth
Dorothea Hagedorn
Mr. and Mrs. Herman Hagedorn

Mary Hagedorn
Arnold Bennett Hall
Matilda Hanson
Henry B. Hazard
Dr. and Mrs. Thomas H. Healy
Miss A. M. Hegeman
Herbert Hengstler
Mr. and Mrs. Charles E. Hill
Stanley K. Hornbeck
Bert L. Hunt
Mr. and Mrs. Alan T. Hurd
Mrs. J. E. Jones
Grace Kanode
Warren Kelchner
Robert F. Kelley
Nicholas Khalil Bey, *Chargé d'Affaires of Egypt*
Major and Mrs. Archibald King
Mary Emily King
Allen Klots
Max J. Kohler
Margaret Lambie
Mrs. O. F. Lampson
Dr. and Mrs. Johann G. Lohmann
James T. Lowe
Rev. Francis E. Lucey
Hans Luther, *Ambassador of Germany*
Francis Crane Macken
Michael MacWhite, *Minister of the Irish Free State*
Charles L. Marburg
Manuel Márquez Sterling, *Ambassador of Cuba,* and Señora de Márquez Sterling
Charles E. Martin
J. B. Matrie
Mrs. Burnita S. Matthews
M. Alice Matthews
John C. Mauro
Mr. and Mrs. David Maynard
Lieut. and Mrs. Alan R. McCracken
Fenton R. McCreery
D. A. McDougal
Matthew M. McMahon
William McNeir
Roberto D. Meléndez, *Chargé d'Affaires of El Salvador*
Mr. and Mrs. James Oliver Murdock
Denys P. Myers
Mr. and Mrs. Harold H. Neff
Rev. Dr. Coleman Nevils
Alexei F. Neymann, *Secretary, Soviet Embassy*
Anna O'Neill
Albina L. Parkins
Mr. and Mrs. Robert P. Parrott
Jefferson Patterson
Alice Paul
Mr. and Mrs. Robert Perret
Stoyan Petroff Tchomakoff, *Chargé d'Affaires of Bulgaria,* and Madame Petroff Tchomakoff
Mr. and Mrs. Clarence A. Phillips
William Phillips, *Under Secretary of State*
Leonide Pitamic, *Minister of Yugoslavia*
Mr. and Mrs. William Jennings Price
M. J. Pusey
Mr. and Mrs. Arthur L. Quinn
Bessie C. Randolph
Adrian Recinos, *Minister of Guatemala* and Señora de Recinos
Admiral William L. Rodgers
H. Leigh Ronning
Mr. and Mrs. Louis James Rosenberg
Miss Rosenberg
Augusto Rosso, *Ambassador of Italy*
Franklin Roudybush
Hirosi Saito, *Ambassador of Japan,* and Madame Saito
Carlton Savage
Dr. and Mrs. James Brown Scott
Jeannette Scott
E. Catheryn Seckler

Andrew D. Sharpe
Mr. and Mrs. Boris E. Skvirsky
Mr. and Mrs. Stanley P. Smith
Nicholas J. Spykman
Ruth E. Stanton
Doris Stevens
Hon. Henry L. Stimson
Mary Hanchett Stone
Major Wallace Streater
Sao-Ke Alfred Sze, *Minister of China*
Mr. and Mrs. T. A. Taracouzio
Alexander Antonovich Troyanovsky, *Ambassador of the U. S. S. R.*, and Madame Troyanovsky
Edgar Turlington
William R. Vallance
Señor and Señora Victor U. Villasenor
Otto Wadsted, *Minister of Denmark*, and Madame Wadsted
Rev. Dr. Edmund A. Walsh
Mr. and Mrs. Charles Warren
Daniel Waters
George T. Weitzel
Mr. and Mrs. Charles West
Gwladys Williams
Mr. and Mrs. Robert R. Wilson
George Grafton Wilson
Mr. and Mrs. Emory Woodall
Lester H. Woolsey
Herbert Wright
Mr. and Mrs. Cyril Wynne
Edward Yardley and guest
Mr. and Mrs. J. Edwin Young

The invocation was pronounced by the Right Reverend Julius W. Atwood, Bishop of the Protestant Episcopal Church.

AFTER DINNER

A toast to the President of the United States was drunk at the suggestion of the Toastmaster.

The TOASTMASTER. For many years we have met in this hotel and in this room, and again we have met and have broken bread together, we members who were then young, and we who are now joining the ranks of those who soon will pass along.

Today, the day before and the evening before the Society has been in session, and it has fashioned its program, especially this year, to take account of changing conditions. For example, the first address of Thursday evening was devoted to the treaty-making power, which is always with us, and very much with us at the present day. Recently, and outstanding in the view of the people, and very important in our foreign relations, there was a conference held, and on this occasion Dr. Rowe gave us an account as only he could give, first hand, of what happened at Montevideo, where the delegation of the United States took part, and was taken into the family of the American nations in a way which has never been the case before, and which we hope will continue to be so in the future.

The further question of international regulation of tariffs was discussed, and in the afternoon, in compliment to the distinguished ambassador on my right, the relations growing out of the recognition of the U. S. S. R. were discussed, and so far as I could make out from the speakers, there was nothing extraordinarily dangerous in it. We have survived the event and are looking forward to a repetition of our former friendly intercourse.

Then in the evening we passed to the protection of foreign bondholders. Then there was a discussion of the reorganization and rehabilitation of governmental loans. And tonight, we gather together, not to exchange views on scientific matters but, as it were, to pass a pleasant evening in company with one another.

The evening will, I hope, be a memorable one. For the first time in years we are honored by an ambassador from a large and magnificent country across the sea, and I shall have in a moment the great honor to ask Mr. Phillips, the Under Secretary of State, to introduce and to present him to this audience.

In the meantime I should like to say just a word in behalf of Mr. Phillips. It is a great pleasure to be permitted to introduce him. Years and years ago in the State Department we began a friendship which has continued and will continue, I believe, as long as we are in a condition to have friendship or relations in this little world of ours. Mr. Phillips was then possessed of the qualities which distinguish him today, character, sincerity, judgment, and courage.

The first instance I can give of his judgment is stated in a few lines which were written at the time both of us happened to be in the Department of State, where Mr. Phillips began at the bottom of the ladder in order to reach the last round of a diplomatic career of ambassador. It seems a request had been made of an Assistant Secretary whose name I do not recall at this moment, for an opinion and for a justification of an action which had been taken, and in reply he sent a communication to the Solicitor, who at that time happened to be the person addressing you tonight, that he had given attention to the matter, and had submitted it to Mr. Phillips and Mr. Heinzelman, and he was happy to say they had concurred with him.

Mr. Phillips' judgment was taken on that early occasion and found to be true. This seems to me the extraordinary state of affairs: the Assistant Secretary of State not considering himself alone capable of responding to an inquiry submitted to Mr. Phillips, and this Assistant Secretary of State expressed himself in a few lines:

> I hope you find this action sound,—
> Us three worked hard ere it was found;
> For it has been approved, you see,
> By *Phillips*, Heinzelman and me.

But, why should I dwell on Mr. Phillips' judgment; he is here—let him speak for himself.

### Remarks by Honorable William Phillips

*Under Secretary of State*

Mr. President, honored guests, ladies and gentlemen: Dr. Scott has given you all, I fear, the impression that it is only in the upper realm of the State

Department that judgment is found, and when one rises to the higher realm at the top of the ladder one depends entirely on the subordinates, and he is correct.

It was a great pleasure for me to accept the kind invitation of the Society to be with you this evening, especially so since the task which has been assigned to me is such a very agreeable one.

It is certainly most appropriate that the Society has, as one of its honored guests at this dinner, the first Ambassador to the United States from the Union of Soviet Socialist Republics. You all recall, undoubtedly, the events which have taken place since the last annual meeting of your Society, and which resulted in the establishment of diplomatic relations between the Soviet Union and the United States. It was the purpose of the conversations which took place in November between the President and Mr. Litvinoff to reach a settlement of the outstanding problems between the two countries with a view to laying the foundation for the establishment not merely of formal diplomatic relations, but of genuinely friendly relations. It was the thought of this Government that, with such a foundation established, it would be possible for the two countries to coöperate for their mutual benefit and for the preservation and promotion of peace among all nations throughout the world. This is the significance of the agreements arrived at between Mr. Litvinoff and the President and the negotiations which have been carried on since that time in Moscow and in Washington with regard to matters which have not yet been definitely settled.

As President Roosevelt stated in his speech at Savannah on November 18, the most impelling motive undoubtedly that lay behind the establishment of relations "was the desire of both countries for peace and for the strengthening of the peaceful purposes of the civilized world." It is obvious, I believe, that the coöperation of the two governments in the great work of preserving peace will be profoundly affected by the strength of the bonds of friendship which have been established between the two countries.

The task of furthering friendly intercourse with the United States has been entrusted by the Soviet Government to one of its most distinguished statesmen. Mr. Troyanovsky not only has played an important rôle in the revolutionary movement which led to the creation of the Soviet Government, but he has also served with distinction in such varied fields as military affairs, economics, and diplomacy. After receiving a military education, he took part in the Russo-Japanese War; he joined the revolutionary movement in 1903 and was exiled to Siberia in 1909, escaping abroad the following year. From then on he lived chiefly abroad, mostly in France, until the establishment of the provisional government in March, 1917, at which time he returned to Russia. Mr. Troyanovsky has held a number of important positions during his brilliant career. From 1923 to 1927 he was Chairman of the Board of the State Trading Company, the Gostorg, and a member of the Board of Management of the Commissariat for Foreign Trade. From 1927 to 1933

he was Ambassador to Japan, and in 1933, prior to his appointment to the United States, he was Vice President of the State Planning Commission, which drew up plans for the first and second five-year plans. These positions give evidence of his talents and capabilities. Not a few incidents in his career bear witness to his courage and strength of character. It is not difficult to imagine the danger faced by an army officer who participated in the work of the revolutionists' underground organization. Certainly it required no little fortitude openly to espouse on the day of its forced dissolution the cause of the Constituent Assembly, that body on which so many Russians placed their hopes.

Those of us who have come in contact with the Ambassador can testify as to his personal charm and the earnestness of his efforts to cultivate the good will and friendship of the American people.

But I should be failing completely in my pleasant task this evening if I omitted to mention Mr. Troyanovsky's gracious and principal helpmate, who has already won for herself an enviable place in the hearts of all those who have had the pleasure of meeting her. In presenting to you the Ambassador, which I am now about to do, I ask you to join in a salute to the charming chatelaine of the Embassy—Madame Troyanovsky.

### Address of Mr. Alexander A. Troyanovsky

*Ambassador of the Union of Soviet Socialist Republics*

I appreciate very much the opportunity to address this distinguished gathering. I am going to take the liberty of expressing here my personal opinions, speaking not as the Ambassador of the U. S. S. R., but as an individual who has some interest in international law and to some extent is familiar with its problems.

I regard my appearance here as a speaker as in some ways significant. You know better than I do that at the present time an Ambassador is a personification of the consistency and of the universality, and to some extent a proof of the existence, of international law. Immunity of diplomatic agents is considered as "established by the authority of the whole world." And this immunity is of course an essential part of international law, in any case from the standpoint of the diplomats. By a coincidence a very important precedent was created in this matter two and a quarter centuries ago by the case of an Ambassador of Muscovy. This Ambassador, Andrew Artamonovich Matveef, was arrested contrary to the law of nations in London in 1706. There was a terrific uproar and scandal and thundering of foreign offices, followed by apologies and the passing of a special Act of Parliament to make effective the rule of international law and the immunity of ambassadors.

You see that responsibility for international law is in a sense up to the ambassadors. This responsibility, however, is too heavy for the ambassadors alone. We have to look for a more solid foundation.

Some students are turning to the idea of a supernational support. But they have not been very successful. International law is a collection of the rules directing the relations among nations. These rules are effective only in so far as the nations themselves accept them, of their own will. The source of the regulating lies in the nations, and not in a superforce acting from above the nations.

Even the tribunal at The Hague is permitted to function only with the consent of the nations. Membership in the tribunal is not compulsory, and its competence is limited by the common agreement of the nations. Practically, this tribunal is a court of arbitration.

The League of Nations is constituted as a body with equal rights of its members, and in substance only unanimous votes are valid, especially since a dissatisfied nation can at any time withdraw from this apparently supernational institution.

The practical experience with the League of Nations goes far to prove that at the present time at least supernational bodies are not effective in binding the nations to coöperate under established rules of international law. This is particularly evident since some nations have assumed the rôle of supernations with the idea, not of coöperating with other nations, but of dominating and conquering them. Even nations that are members of the League have found no immunity from such efforts.

I do not think that one must take too seriously the view which includes under international law moral laws and the laws of human conscience. These of course have an indirect influence on international law, but how can they be directly converted into rules of international law when different nations (and even different parts of the populations of a single nation) have very different views on what constitutes the moral law and the dictates of conscience. The guidance from this source is too subtle and lacks so much in precision that it is more than insufficient for the regulation of international relations.

We have to find something more positive, more concrete and definitive. I think that only very precise international treaties duly signed can give us an acceptable basis for international relations, and consequently for international law. Vague ideas and general rules can constitute a very good stimulus for the further development of treaties and international law, but the world situation badly needs exact formulas and determined obligations.

As an example, I could mention the Kellogg Pact, which has had a favorable influence on the public opinion of the world but was not precise enough to govern practical relations between the nations. It has been followed by a system of non-aggression pacts and treaties containing a definition of aggression. In working out this system of pacts and treaties, the Soviet Union took an active, sometimes a leading part. Agreements of this kind leave less room for misinterpretation than pacts composed in vague terms.

Before I end, I should like to cite a Russian fable about the cat found by the cook devouring the meat. The cook, who was apparently something of a

statesman, instead of applying immediate sanctions to the cat, began to reason with and reproach it. The fable concludes with the words:

> And still Cook's eloquence kept flowing like a river;
> It seemed the scolding would go on for ever;
> But ere the sermon was complete,
> The cat had polished off the meat.

I guess this fable was written with international relations in view. It raises the question, what has to be done when the cat listens and continues to eat? That is to say, what shall we do about sanctions in international relations?

These difficult and intricate problems are solvable, but their solution presupposes a real coöperation of peace-loving countries and respect of the governments for treaties signed by them. Collaboration of jurists in codification, in study of precedents, in the formulation and suggestion of new international agreements, would of course be highly useful. Public opinion, the press, statesmen, diplomats, must not spare their efforts to create coöperation of the Powers for support of existing international law in the form of signed treaties and obligations, along with necessary changes of obsolete agreements.

It is to be regretted that the policy of the ostrich, which hides its head in the sand in order to avoid danger by not seeing it, and the policy of those who extinguish the fire by pouring oil on it, are not less common in international relations.

International law as a law of peace and justice can be saved and supported only with a certain minimum of international unity, which does not close the door to progress and adapts itself to changing conditions. If this is not realized, the breakdown of international law, in whole or in part, is inevitable.

The TOASTMASTER. Ladies and gentlemen: Some twenty-eight years ago, when the American Society of International Law was formed, the membership requirements were expressed in such a way that the legal mind of Mr. Root held that the Society could not include women. The result was an amendment, so that we have the honor of members of both sexes without discrimination.

Recently we have learned that the administration of law and justice would not be complete unless those called to its service should include, not merely distinguished men, but distinguished women, and that there should be no discrimination in the matter of sex in the analysis and in the application of law.

Several months ago the President of the United States, with his eyes open to a new and enlarging world, in which justice shall rule over force, appointed a distinguished lawyer, an experienced judge of Ohio, to the Circuit Court of the United States. To begin with, she had studied music, and it may be that the study of music aided her in harmonizing the discordant laws which exist, not merely in Ohio, but in other parts of the country.

Be that as it may, after practicing at the Bar, she was municipal judge in Cleveland, later elected by the vote of her fellow citizens of Ohio to the Supreme Court of that State, and more recently she has been appointed to the Circuit Court of Appeals of the United States, just one ladder below the Supreme Court of the United States; and, ladies and gentlemen, I live in the hope that she may put her foot upon the upper ladder and one day be sworn in as a Justice of the Supreme Court of the United States.

Ladies and gentlemen, I have the very great honor of introducing Miss Allen, Judge Allen of the Circuit Court of Appeals of the United States, who will now address you.

## THE OBJECTIVE OF INTERNATIONAL LAW

By Honorable Florence E. Allen
*Judge of the United States Circuit Court of Appeals*

"Wars may be divided into two classes," said James Madison, "one flowing from the mere will of the government, the other according to the will of the society itself." He intimated that the first class of wars would be eliminated under the Constitution of the United States. Hall, in his great work on *International Law* (8th ed.), considering the relation of international law to war, comes to the conclusion that every type of war must simply be accepted as a fact in human life. He says: "International law has . . . no alternative but to accept war independently of the justice of its origin as a relation which the parties to it may set up as they choose and to busy itself only in regulating the effects of the relation." An admission, truly, of the inadequacy of international law!

Law between individuals does not accept violence independently of the justice of its origin. It presupposes the existence of peace between individuals and bans the use of force.

The series of Pan American Conferences has gradually laid the groundwork for legislation establishing the rules of conduct between nations. As a climax to their work, in the epoch-making conference held at Montevideo (the Seventh International Conference of American States), the Pan American states defined an objective absolutely at variance, from the standpoint of international law, with the above statement of Hall. They repudiated the acceptance of the war system. In Article 10 of the Convention on Rights and Duties of States they said:

> The primary interest of states is the conservation of peace. Differences of any claims which arise between them should be settled by recognized pacific methods.

How far the American doctrine transcends the old order appears in Article 4:

> States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon

> the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

When states really enjoy equal rights irrespective of physical power, armed intervention must go. As a matter of fact, armed intervention is never practiced by the weak against the strong. It is exercised only by the strong against the weak.

As a natural result of Article 4 therefore, follow Article 8 and Article 11 of the convention. Article 8 abolishes the right of armed intervention, and Article 11 provides for the non-recognition of territorial acquisitions obtained by force. These articles conform to the genius and tradition of American international policy. Dollar diplomacy did for a time exist, but it did not represent the American people.

But really to admit that the primary interest of states is the conservation of peace, defines the objective for the Pan American Union. It follows, therefore, that this definition sets the objective for international law within this hemisphere.

This particular objective, namely, the conservation of peace, has not been the objective of general international law until comparatively recent times. International law did, as Hall says, recognize war irrespective of the justice of its origin and "as a permitted mode of giving effect to its decisions." Hall too points out one of the great gaps in international law when he says:

> Theoretically, therefore, as it [international law] professes to cover the whole field of the relations of states which can be brought within the scope of law, it ought to determine the causes for which war can be justly undertaken; in other words, it ought to mark out as plainly as municipal law what constitutes a wrong for which a remedy may be sought at law. It might also not unreasonably go on to discourage the commission of wrongs by investing a state seeking redress with special rights and by subjecting a wrongdoer to special disabilities.

Hall adds that such law could never be enforced, and so he thought that all international law could do about war was to "busy itself in regulating the effects of the relation." This is somewhat comparable with the situation which might have arisen if individual law had attempted to solve the problem of murder by taking care of the corpse.

Might it not be that this attitude, expressed by Hall, limited the thinking of really great international scholars? The difficulties of enforcing substantive law between states seemed appalling. They had no adequate conception of the possibility of international legislation through treaty. They failed to describe the gap in international law. They failed to point out how that gap could be closed, and an objective such as has been defined by the recent Pan American Conference was beyond their comprehension.

Now slowly, tentatively, with painful groping, law dealing with the primary international relationships is being built between the nations. The Multilateral Pact has been criticized tonight for its vagueness. It is not per-

fect. But without the Multilateral Pact I question whether America would have right-about-faced on the policy of armed intervention in this hemisphere. A journey of a thousand miles begins with one step. At any rate the Multilateral Pact gave powerful moral backing to those who questioned our policies toward the Latin-American countries in recent years. After all, we cannot quite consistently renounce resort to war and then enter into armed expeditions, which lack only the authority of Congress to make them in the legal sense wars.

This convention of the Pan American states declaring the equal rights of states irrespective of their size and power, abolishing the right of armed intervention, abolishing the territorial gains of conquest, constitutes our attempt in this hemisphere to declare substantive law between the peoples. Whether or not they are embodied in a treaty by our Senate, as the Multilateral Pact, or voted for with reservation, as this Montevideo Convention was voted for by our American delegation, these measures were conceived because at last men and women realized, peoples realized, international experts realized that the objective of international agreement, of law, of treaty, is not primarily to deal with the technical rights of consuls and ambassadors, not primarily to make rules governing the three-mile limit or territorial waters, but is, as this convention says, "The conservation of peace."

When that objective once is recognized throughout a nation, peace machinery can be and is built. The prerequisite which is needed more than any other for the actual outlawry of the war system is that we recognize the outlawry of war as the objective; that we declare law by treaty just as this Pan American Union is beginning to do, to that specific end, and that we cherish the spirit of genuine renunciation of resort to war.

How feasible the settlement of international controversy is when the parties really desire to "conserve peace" and to settle difficulties without resort to force, is nowhere more emphatically shown than in the adjustment of certain vexatious claims between citizens of the United States and Mexico. In 1862, Secretary Seward, writing to Corwin, the American Minister to Mexico, said: "I find the archives here full of complaints against the Mexican Government for violations of contract, and spoliations and cruelties practiced against American citizens." These complaints, thus vividly described by Secretary Seward, were included in the 1,017 complaints on the part of citizens of the United States which were examined and adjudicated by a mixed commission under the conventions of 1867, 1871, and 1878. These controversies were exactly the sort of controversies, some of them of aggravated importance, arising out of the killing of peaceable citizens of the United States, that are apt to lead to war.

In addition to adjudicating claims between citizens of the United States and the Mexican Government, the same commission adjudicated claims between Mexicans and the United States Government. The sums claimed on the part of citizens of the United States against Mexico aggregated $470,126,-

613.40 U. S. currency; $4,125,622.20 (less than one per cent. of the claims) were allowed. The claims of Mexicans against the United States amounted to $86,661,891.15; $150,498.40 were allowed.

It is impossible to over-emphasize the importance of these decisions as an instance of the perfect feasibility of settling vexatious difficulties between nations by a resort to the ordinary principles of equity and justice. While these cases were not heard by a court, evidence was admitted and the ordinary rules of law were actually applied in the decision of the controversies without the establishment of any World Court, Hague Court, or any other elaborate world tribunal. I do not mean by this statement to decry the importance of permanent machinery continually functioning for the adjudication of international disputes. The point I do make is that the thing which is needed more than any other for the uprooting of the war system is the spirit of conciliation and the renunciation of the resort to war.

I suggest as an objective for this great association not merely the teaching of international law as it is, but the teaching of international law as it should be. I suggest as an objective of this association that we be led by the spirit of our distinguished President, Dr. James Brown Scott, whose creative thought and precise statement have left their imprint upon so many of the projects of this vital experiment in international legislation, the work of the Pan American Union. In the days to come, that international law which is now amorphous, chaotic, inchoate, that international law which neglects the vital rights and duties of states, which in many ways, as Hall admits, allows and acquiesces in the doctrine that "The State can do no wrong," will be rewritten. A Ten Commandments for the nations will be created. No longer shall we say that international law recognizes war irrespective of the justice of the cause. Machinery will gradually be built to enforce that law. Existing machinery will be adapted to that purpose. And toward that objective the men and women in this room endowed by study, by learning, by creative thinking, by aspiring idealism, should move with deliberate and conscientious purpose, seeking to achieve the end so splendidly expressed by President Roosevelt, that "From now on war by governments shall be changed to peace by peoples."

The PRESIDENT. Now, ladies and gentlemen, you can see what the International Law Society has gained by flinging its doors wide open to the women of the United States.

The next and the last speaker of the evening is Mr. Coudert, who never fails us when we ask him, and who always charms when he comes. It makes no difference what subject he speaks upon, or whether he speaks upon none, for he has the charm of the Frenchman and the ingenuity of the American, and the eloquence that makes the charm of both.

I sometimes think of what Sidney Smith said about Lord John Russell, when I observe the agility with which Mr. Coudert jumps from subject to subject and succeeds where my Lord John would, according to Sidney Smith, have failed. I am quite sure in the incident which I am about to relate, that

Mr. Coudert somehow or other and without experience, would force his way through, or at least he would persuade us that he had succeeded, which is I understand a great element in the success of lawyers.

Sidney Smith said of Lord John Russell at the time he was leading the House of Commons, just as our friend Coudert is leading the Bar of the United States, that he would take command of the Channel Fleet on ten minutes' notice, that he would operate for the stone, and that he would reconstruct St. Peter's if it had fallen down, and nobody would observe by his Lordship's demeanor that the fleet was knocked into atoms, that the patient had died, and that St. Peter's had crumbled into dust. But the difference between my Lord Russell and our friend Coudert, is that he always succeeds in what he undertakes. He will even succeed in a speech tonight, after the distinguished speakers who have preceded him. What he will say, I do not know; what subject he will touch, I do not care, for I well know that whatever he touches he always adorns,—Mr. Frederic R. Coudert.

### Remarks of Mr. Frederic R. Coudert

*Of the New York Bar*

Ladies and gentlemen: You who are among the younger members of this Society, as are all of the women and some of the men, may realize that for some ten years or more, and more probably, I have been subjected to an annual grilling by my friend, Dr. Scott. Why he does it I have never known, but he does it in that delightful ironic Scotch manner of his, which gives pleasure to others, especially himself, and which does me, so far as I know, no particular harm.

He chides me with the valor of ignorance, and I realize his complete immunity, covered as it is in a glorious red velvet gown which he had imposed upon his unwilling and modest self some years ago by the University of Cambridge.

It was Talleyrand who said that no one who had not lived before 1814 knew the real delight of life. I often think of that remark in this turmoil of a world in which we now live, whose difficulties and doubts cannot be wholly conjured away by the delightful, stimulating and sometimes somnolent addresses that take place at these meetings.

Today we live in a world of doubts, uncertainties and experiments. But, was it not always so? My mind goes back to a luncheon on the terrace of the House of Commons on the 28th of July, 1914, at which were present about a half dozen Members of Parliament, some of them destined to hold high position in the Government during the Great War, and I remember the remark there made that the relations between Germany and England were better than they had been in some years. Within ten days afterwards, the first German horsemen had crossed the French frontier, and the first shot had been fired in the World War.

At the beginning of the Great War during the French mobilization, I heard people on all sides saying, "This is a war against war, the last and final conflict." Yet, as we sit here today, sixteen years after the termination of that hideous catastrophe, we are again confronted with more than the possibilities of its recurrence on an even larger and more fantastically appalling scale. Dr. Butler said not long ago that we are probably living in one of those great periods which occur at intervals of centuries and which witness complete upheaval in the whole social and political life of nations.

Our capable and most lovable President of the United States, who perhaps more than anyone else is charged with the burdens of the world today, preferred to speak of the rapid changes now taking place as those of evolution rather than of revolution. I care little which of the two is used, although the rapidity of the changes is such that, even when unaccompanied by the violence usually associated with revolution, it seems to me they are fairly entitled to be denominated by that more dramatic term.

International law, like all the other branches of the law, is and must be the resultant of life in all its manifestations and changes. It cannot remain static while the ideas and purposes of men are in process of rapid change. Men may be roughly divided into those who temperamentally refuse to change anything, and those who equally love change for its own sake. Between these two types are many degrees of opinion.

This is an age of experiment—social, political, financial and constitutional. Who could have predicted that we would fundamentally amend our Constitution and then repeal the amendment within little more than a decade! How are the experiments to be judged? Are they good or are they bad? Is there such a thing as the verdict of history? The great French Revolution which profoundly affected and still affects the world, was pronounced one hundred years after its beginning, by Ernest Renan, then the greatest intellectual force in France, as an experiment that had failed. Can there be said to be any verdict of history as regards the Reformation? Are not historians and philosophers still differing as to whether it was a beneficent movement striking off old shackles from the human mind, or whether it was a movement destructive to that spiritual and legal unity of Europe, so essential to the peaceful development of civilization?

The beginning of national states in Europe involved a new experiment, a new law and a Grotius to formulate that new law. It is the evolution of the states and the disappearance of the dominant idea of a united *imperium* represented by Empire and Papacy which brought about the beginning of what we now call international law.

Again law was following life and its multiple changes. The so-called changeless law of the Medes and the Persians, the classic example of static law and custom, did not survive the conquering Alexander and the inroad of the restless and revolutionary spirit of Greece.

Our American law and Constitution have been profoundly affected by industrial revolution, and the immense inventions of modern science, resulting so largely in the urbanization of a once predominant agricultural land. Our legislation and our habits of thought have been forced to follow, and from a rough approximation to individualism we are moving with gigantic strides toward government by bureaus, state and federal, and are affected by an ever-increasing pressure of the state upon the man.

Our American foreign policy has ever been a vague thing, but the dominating thought since the time of Washington has been to avoid entanglements in Europe which might bring us into wars in which we had no interest. How far that policy has succeeded it is difficult to say. It was predicated upon a neutrality, wise in its inception, but which did not prevent our participation in the struggle between England and Napoleon and, in recent years, between a militant Germany and her many foes.

Neutrality, too, was an experiment, an experiment dictated by our position, by history and by geographical situation. Can it be said to be a final experiment? Has not the world so changed, have not conditions been so modified that America cannot afford to be indifferent to the forces working in the East or in the West?

The World Court, long the great dream of theorists, has become an actuality and appears to be an experiment that has worked. The League of Nations, a great and noble experiment, hangs in the balance, and we may not know for another generation whether any such experiment is feasible or workable, or whether national feelings and the inherent pugnacity of mankind may make it possible for generations to come. Will it be possible to insist upon the "Open Door" in the Orient, the integrity of the great people of China, and other doctrines that did seem of importance to American policy twenty years ago?

The prophecies and predictions of men in one generation usually appear childish and futile to that of the succeeding generation. Who could have guessed in 1918, when, flushed with victory, the American and Allied armies fired the last shot, that the world today would be more disturbed, more hectically anxious and fearful than it was in 1913?

What must the international lawyer do in this time of disconcerting change and unforeseeable disturbance? Perhaps his rôle cannot be an ambitious one, nor can he hope everywhere to substitute law for force, but at least he can raise his voice in insisting that the organs of law and diplomacy, which the world now possesses, can be used to their full, that if experiments must be, and, indeed, they are inevitable, that they should be undertaken deliberately rather than under the emotions of the moment. As Professor Laski aptly says:

> Law, like life, has its periods of change and its periods of conservation; it is not a closed system of eternal rules elevated above time and space. . . . The lawyers' regard for precedent has been one of the great

preservative forces in history; I do not for a moment deny the importance of the contribution it has made.

But there come epochs in the history of mankind when too strict regard for precedent serves to destroy rather than to preserve. . . . It is the lawyers' function to make his doctrine; keep step with the spirit of the time. He must seek continually to reshape them to new needs and new compulsion; he must make the researches which can give to experiment the prospect of success. Our age is refashioning swiftly the foundations of its social life; yet has no higher task than the readjustment to this novelty. *If I am told that law is not morals, I can only answer that it is then so much the worse for law, for the degree of our separation, as our law of divorce so notably shows, is always a measure of its failure.*[1]

Law inevitably suggests a loyalty to something. Without such a loyalty there can be no sanction. Dr. Figgis has admirably shown how the supremacy of law in the modern world was due to the theory of the divine right of kings and of the loyalty due to kingship. Today we have largely dispensed with loyalty to the person of the sovereign and have substituted therefor loyalty each one to his own land. The personification of the idea might go into the limbo of historic oblivion, but reverence for law and patriotism remain, although the kingship has in the main disappeared. Loyalty to the nations is now as obvious as the loyalty of the individual to the family, and no concrete symbol other than the flag is necessary to sustain that loyalty.

And so in the Middle Ages loyalty to the headship of Christendom symbolized by the Pope or the Emperor was once an undisputed fact and constituted a real security for that great Western civilization derived from Greece and Rome and Judea. Today that loyalty so personified is but an historic memory in so far as it was political, but that same civilization remains as our heritage, and must at all costs be preserved from destruction and barbarism.

Can there not be a loyalty to the idea personified in the Emperor as there has been in that of the King? May we international lawyers not hold a community of nations independent, yet interdependent, as an ideal worthy of service and sacrifice, an ideal sanctioning treaties and fructifying international decision? May not such loyalty as an ever-growing force among men prove of great value to the preservation of that common heritage so threatened with destruction through the bitter rivalries and hatreds among the heirs? For lack of a larger loyalty, must mankind revert to barbarism?

I say that international law must be linked to a loyalty which will have back of it that sense of the great value of the community of nations.

The PRESIDENT. I dare not dull by one word of mine Mr. Coudert's eloquence. I shall merely let myself thank you for your presence this evening, and express the hope we may meet again in this room twelve months hence.

[The benediction was given by the Reverend Dr. Coleman Nevils, S.J., President of Georgetown University.]

[1] Studies in Law and Politics, p. 295.

## REPORT OF THE JOINT COMMITTEE ON PUBLICATIONS OF THE DEPARTMENT OF STATE

Your committee was constituted at the last annual meeting to serve as a Joint Committee with one appointed by the Fifth Conference of Teachers of International Law and Related Subjects.

At the time of the meetings a year ago, your Committee sought an interview with the Director of the Budget. Due to the pressure of official business, Mr. Douglas was unable to meet us at that time but we were received by his assistant, Mr. Brown. We explained to him our concern in the question of the appropriation for the publications of the Department of State and he explained to us the concern of the Bureau of the Budget in keeping the executive departments' budgets reduced to the lowest possible minimum. We were thereafter received very sympathetically by the Hon. Wilbur J. Carr, Assistant Secretary of State and Dr. Hunter Miller, Historical Adviser of the Department. They explained to us the publications program of the Department and the budgetary limitations under which they were forced to operate.

Subsequently your chairman corresponded and had further interviews with Mr. Carr, and with Dr. Cyril Wynne, then Assistant Historical Adviser and now Chief of the Division of Publication and Research of the Department of State. It is a pleasure to report that these and other officials of the Department continued to demonstrate that cordial and courteous attitude which had marked their relations in the past with similar committees of this Society. All pertinent information was placed at our disposal and everything possible was done to facilitate our endeavors.

Your Committee then addressed the Director of the Budget, submitting a detailed memorandum and statement of the amounts which we felt should represent the minimum appropriations at this time for publications of the Department of State. We requested that the Director grant a hearing to a small subcommittee as his predecessor General Lord had done in 1928. Letters supporting our request were sent to the Director of the Budget by various members of the Committee and by Mr. Newton D. Baker, Dr. Nicholas Murray Butler, Mr. John W. Davis, Mr. Allen W. Dulles, President Robert M. Hutchins, Mr. Frank L. Polk and Col. Henry L. Stimson. Our communication received a formal acknowledgment from an assistant to the Director of the Budget but no reference was made to our request for a hearing. This communication and some informal advices led your Committee to the conclusion that the Bureau of the Budget was not inclined to give any consideration at this time to any increase in the allotment for publications in the Department of State's appropriation.

The Chairman of your Committee wishes to acknowledge frankly that

the fact of his not residing in Washington was a considerable handicap to the furtherance of the Committee's task. It is believed to be essential to select hereafter as chairman of any committee charged with this function, someone who is a resident of Washington. The Chairman regrets that he did not secure an opportunity for your Committee to be heard before the Appropriation Committees of either the House or the Senate. With the able and courteous coöperation of Mr. Stanley P. Smith of Washington, an attempt was made at the last moment to secure an amendment to the appropriation bill to include a small sum for the State Department publications, but the attempt came too late and failed.

You will recall that the efforts of this Society and of the Teachers' Conferences to enlarge the scope of the publications of the Department of State began in 1928. For that year the Department's total appropriation for binding and printing was $190,000. In 1930 it had been increased to $218,000. In 1931 we reached the peak of $301,665, falling to $285,000 in 1932, to $220,000 in 1933, to $185,000 in 1934. But while the *appropriation* for 1934 was $5,000 less than that for 1928, the Bureau of the Budget approved an *expenditure* of only $110,452. For 1935, the *appropriation* itself is only $107,180. It is thus apparent that the advances of the past five years have been swept away and the situation is worse than it was in 1928.

In his testimony before the subcommittee of the House Committee on Appropriations, Dec. 5, 1933, Dr. Wynne made some statements which I think should be inserted at length in this report because they reveal clearly the splendid attitude of Dr. Wynne and the State Department and the hopelessness of their efforts when the Budget Bureau and Congress refuse sufficient funds:

> I regret that the items in question do not appear as there is a big demand for the Foreign Relations volumes, which comes from lawyers with an international practice, teachers of international law and related subjects and such organizations as the American Society of International Law, the American Historical Association, and the Political Science Association; in fact, there is a feeling among members of this group that we are too far behind in the publication of the Foreign Relations volumes. I believe that this feeling is justified, although I think it is but fair to point out that the Department's record in publishing the volumes during the past two years far exceeds what was done in former years, when the average was one volume a year. During the fiscal years 1932 and 1933, the Department published three 1917 War Supplement volumes, three 1918 War Supplement volumes and three 1918 Russia Supplement volumes.
>
> With respect to Mr. Miller's *Treaties and Other International Acts of the United States of America*, this publication is, as you know, one of which the Department can well be proud; it represents a profound knowledge of the subject and contains information which will be of great practical value to the lawyer as well as the teacher and student of international law and diplomacy. The first two volumes which have been published were highly praised by such men as Mr. Chief Justice Hughes, Mr. Justice Cardozo, Mr. John W. Davis, and Colonel House.
>
> I am glad to be able to state that although we are not in a position, for the reason mentioned, to submit estimates for the Foreign Relations and the treaty volumes, we have funds obligated from previous appropriations which will pay for the cost of publishing

several volumes during the next two years. We expect to issue in 1934 two 1919 and two 1920 Foreign Relations volumes and Volumes III and IV of the treaty edition.

Reference may also be made to two other publications that the Department planned to issue but which were not approved by the Bureau of the Budget. I refer to the proposed revised edition of *The Immigration Work of the Department of State and its Consular Officers*, which it was estimated would cost $700 to print, and the proposed revised edition of *Admission of Aliens into the United States*, for which the estimate was $1,500. I believe it would be advisable to issue these revised editions, but as our requests for the appropriations in question were, as I said, not approved by the Bureau, these items are not included in the printing and binding estimates for 1935 which are submitted.[1]

And Mr. Carr added in hearty support of this point of view:

Our estimate for 1935 is $107,180, which is $3,272 less than the proposed expenditure for this year. This decrease will result in retarding the issuance of volumes of Foreign Relations and of the Treaties, as well as to cut down on some of the other printing of documents containing information such as press releases, reports of international commissions, and so forth, which have been very much desired by a great many people, and which in the past we have felt the public ought to have for its information, and for study, and which international lawyers and students should have. However, it is impossible to continue that work with the amount of money we have allotted to us.

It must also be borne in mind that in addition to the reduction of the allotments for printing and binding, cuts have also been made in the budgets for personnel with the result that there is danger of so weakening the expert staff built up in the Division of Publication and Research as to make it difficult to resume a more nearly adequate program of publications.

It seems to your Committee apparent that this subject is one which needs active work and that this work must be mainly before Congressional Committees. The State Department does not need to be persuaded; it needs to be financed. Your Committee therefore recommends that this Committee be continued and that its membership be reconstituted with a view to selecting persons who are in a position to devote the necessary time and attention to this task.

Your Committee would like to emphasize also the desirability of all members of the Society assisting in this work by promoting the sale of the Department's publications. Under the present system a deposit account can be opened with the Superintendent of Documents and a standing order placed for all or any of these publications. A deposit of $10 or $15 a year is sufficient to enable a subscriber to receive regularly the Press Releases containing many diplomatic notes and other current information of value; the Treaty Information Bulletin with up to date information on ratifications, etc.; the Treaty and Executive Agreement Series and many of the special series such as the Conference Series, the Arbitration Series, the Latin American Series, and so on, as well as the volumes of Foreign Relations and Dr. Hunter Miller's Collection

[1] Department of State, Appropriation Bill for 1935, Hearing Before the Subcommittee of House Committee on Appropriations, 73rd Cong., 2d Sess., pp. 51–52.

See also Dr. Wynne's address of March 24, 1934, in Department of State *Press Releases*, March 24, 1934, Weekly Issue No. 234, p. 164.

of Treaties, as these appear. Welcome contributions of this sort are Prof. Colegrove's editorial note on "The Publications of the Department of State" in *The Booklist* of January, 1934—this being the organ of the American Library Association—and Prof. Quincy Wright's article on the same subject on the same date, in the *Iowa Law Review*.

### Pan American Documentation

Your Committee was also charged with consideration of the question of documentation of the Pan American Conferences.

The situation in regard to the reports of these conferences has long been unsatisfactory from the point of view of students of the subject. The documents of each conference are printed and distributed by the host country. Each government follows the format which appeals to it individually. Aside from distribution to the governments, there is no channel through which these important documents are made available to individuals or to libraries. Indeed it is difficult to find out even when the documents appear. Some of the documents of the Sixth Conference held at Havana in 1928, are appearing only now after the close of the Seventh Conference at Montevideo.

In September, October and November of 1933, this question was discussed with Dr. L. S. Rowe, Director General of the Pan American Union, and with officials of the Department of State. On all sides the most helpful coöperation was accorded. A draft resolution looking toward the formulation of plans for uniform documentation was submitted with an explanatory statement to Dr. Rowe and to the Department of State with the request that the matter be taken up if possible at Montevideo.

It may have been partly due to these efforts of your Committee that the Seventh Conference adopted the following resolution:

> That the minutes and documents of the International Conferences of American States, either general or technical, be published within a year from the day of their adjournment, and that a uniform type and a systematic plan be adopted in the publication of volumes, which should contain general indexes.

The adoption of this resolution must be received with gratification by all students of international affairs.

The Director General of the Pan American Union now has under consideration the plans to be adopted in conformity with this resolution, and has courteously indicated a willingness to accept the coöperation of a committee of this Society.

He has also expressed a willingness to take under advisement plans for the distribution of these documents. It is believed that plans can be elaborated whereby, through the office of the Director General, it may become possible for libraries and individuals to purchase regularly all documents of Pan American Conferences.

Your Committee therefore recommends that a small Committee on Pan American Documentation be appointed to confer with the Director General

of the Pan American Union with a view to the preparation of plans on the matters just indicated.

In concluding this report it is proper to note that your Committee has coöperated with similar committees of the American Historical Association and the Association of American Law Schools. This coöperation should be continued and extended. Particularly with reference to representation before Congressional Committees, it is desirable that all scientific societies interested in this field should present a united front in order to emphasize the keen and continuous interest which they all have in this important subject of making available the source material on which their work must depend.

Finally, the Committee desires to record its appreciation of a generous grant of $250 by the Carnegie Endowment for International Peace toward defraying the necessary expenses of the Committee. The major part of this sum is still available for the continuance of the work of the Committee.

Respectfully submitted,

JOINT COMMITTEE ON PUBLICATIONS OF THE DEPARTMENT OF STATE

| | |
|---|---|
| Chandler P. Anderson | Roland S. Morris |
| Edwin M. Borchard | Fred K. Nielson |
| Charles Henry Butler | William J. Price |
| Kenneth W. Colegrove | Jackson M. Ralston |
| William C. Dennis | James Brown Scott |
| George A. Finch | Elbert D. Thomas |
| Thomas H. Healy | Charles Warren |
| Manley O. Hudson | George T. Weitzel |
| Charles Cheney Hyde | Lester H. Woolsey |
| Howard T. Kingsbury | Quincy Wright |
| Arthur K. Kuhn | Philip C. Jessup, *Chairman* |

## MINUTES OF THE EXECUTIVE COUNCIL

### Thursday, April 26, 1934

The Executive Council of the American Society of International Law met on Thursday, April 26, 1934, at 2.30 o'clock p. m., in the office of the Society at No. 700 Jackson Place, N. W., Washington, D. C.

The PRESIDENT of the Society, Dr. JAMES BROWN SCOTT, presided during the first part of the meeting, and the Chairman of the Council, Mr. CHARLES HENRY BUTLER, presided during the latter part of the meeting.

The SECRETARY called the roll and the following members were present:

| | |
|---|---|
| CHANDLER P. ANDERSON | WILLIAM J. PRICE |
| HOLLIS R. BAILEY | HAROLD S. QUIGLEY |
| HERBERT W. BRIGGS | BESSIE C. RANDOLPH |
| PHILLIP MARSHALL BROWN | JESSE S. REEVES |
| CHARLES HENRY BUTLER, *Chairman* | JAMES BROWN SCOTT, *President* |
| GEORGE A. FINCH, *Secretary* | IRVIN STEWART |
| JAMES W. GARNER | ELBERT D. THOMAS |
| MANLEY O. HUDSON | GEORGE T. WEITZEL |
| WILLIAM I. HULL | JOHN B. WHITTON |
| HOWARD T. KINGSBURY | GEORGE GRAFTON WILSON |
| CHARLES E. MARTIN | LESTER H. WOOLSEY, *Treasurer* |
| FREDERIC D. MCKENNEY | HERBERT WRIGHT |
| DENYS P. MYERS | CYRIL WYNNE |

Letters of regret were submitted from Professor Edwin D. Dickinson, Judge John Bassett Moore, and Mr. Thomas Raeburn White.

The notice of the meeting was read by the SECRETARY, who also submitted the minutes of April 27, April 29 and May 13, 1933, as printed in the *Proceedings* of the Society for that year, pages 235, 244 and 247. The reading of the minutes was dispensed with and they were approved as printed.

The following report on the membership of the Society was then submitted by the SECRETARY:

| | | |
|---|---|---|
| Membership at date of last report, April 27, 1933: | | |
| Honorary members | 9 | |
| Life members | 30 | |
| Annual members | 1,025 | |
| | | 1,064 |
| New members since last report: | | |
| Honorary | 1 | |
| Life | 0 | |
| Annual | 121 | |
| | 122 | |
| Reinstatements | 11 | |
| | | 133 |
| | | 1,197 |
| | | 211 |

| | | |
|---|---|---|
| Losses of membership since last report: | | |
| Resigned | 55 | |
| Deceased | 15 | |
| Dropped | 83 | |
| | | 153 |
| Present membership | | 1,044 |
| Net loss since last report | | 20 |

The SECRETARY also submitted the following report on subscriptions to the *American Journal of International Law:*

| | | |
|---|---|---|
| Subscriptions reported April 27, 1933 | | 1,133 |
| Subscriptions cancelled since last report | 47 | |
| New subscriptions since last report | 43 | |
| Net loss | | 4 |
| Total subscriptions April 26, 1934 | | 1,129 |

After brief comments by the SECRETARY upon these figures, his report was received, approved and ordered to be filed.

The TREASURER submitted his report for the year ended December 31, 1933, and after an oral statement by him by way of summary of its contents, the report was received, approved and ordered to be filed.[1]

The report of the auditors, F. W. Lafrentz & Co., showing that the accounts of the Society were in good order, was submitted by the TREASURER and, after examination, was likewise received, approved and ordered to be filed.

MR. WOOLSEY then referred to the resolution adopted by the Executive Committee on May 13, 1933 (*Proceedings*, 1933, p. 247), upon the request of the Union Trust Co., to authorize the rental of, and access to, the safe deposit box of the Society. Mr. WOOLSEY stated that he thought better provision should be made than that contained in this resolution to safeguard the responsibility of the Treasurer, who, under the Constitution of the Society, is charged with the custody of its funds. He suggested in this connection the possibility of incorporating the Society. After discussion, the following resolution was adopted:

> *Resolved*, That the suggestions of the Treasurer in regard to the revision of the resolution of the Executive Committee of May 13, 1933, concerning access to the safe deposit box of the Society, and as to the possibility of incorporating the Society, be referred to the Executive Committee, with power to revise the said resolution of May 13, 1933, and, if necessary in the matter of incorporation, to report to the Society for further directions.

Mr. BUTLER, Chairman *ex officio* of the Executive Committee, announced that the committee would meet immediately upon the adjournment of this meeting of the Council.

[1] It is reprinted herein, *infra*, p. 216.

The EDITOR-IN-CHIEF of the *American Journal of International Law* submitted the four numbers of the *Journal* which have been published since the last meeting of the Society, and a written report on the work of each editor. The report was received and approved.

The MANAGING EDITOR of the *Journal* reported that when it became known that the cost of printing-paper would rise, he had authorized the Society's publishers, the Rumford Press, to purchase a year's supply of paper at the then prevailing cost, which had been done, and the paper paid for. He also reported that the cost of printing had been increased approximately 10% by the N.R.A. codes and regulations, but that in conference with the representative of the Rumford Press, the latter had agreed to increase the cost of printing to the Society by only 6%. The report was received and approved.

Professor JAMES W. GARNER, the Chairman of the Committee on Selection of Honorary Members, reported that the committee had given consideration to several names, but had reached no agreement and therefore made no recommendation. It was thereupon duly moved and carried that the nomination of an honorary member be passed for the present year and that the committee's report be received and filed.

Mr. HOLLIS R. BAILEY, Chairman of the Committee on Increase of Membership, submitted a report showing that through the efforts of the committee, 118 new members had been obtained since the last annual meeting. The SECRETARY supplemented the Chairman's report by stating that, following the suggestions made at the meeting of the Executive Committee on May 13, 1933, each member of the Society who was also a member of the American Bar Association had been requested to propose for membership in the Society his friends and acquaintances in that association. He submitted a list of 37 members who had complied with this suggestion, showing the number of new members obtained by each. The SECRETARY also stated that invitations had been addressed to the principal foreign consular officers in the United States, and that a total of approximately 1,500 invitations with appropriate literature had been sent out during the year. Whereupon, the report of the Committee on Membership was received, approved and ordered to be filed, with an expression of thanks to the Chairman.

In connection with the consideration of the membership of the Society, Professor MANLEY O. HUDSON called attention to the meeting in Washington of the Section of International and Comparative Law of the American Bar Association, preceding the meeting of the American Law Institute, May 10–12, 1934. He suggested that if the meeting of the Society were held at or near the same time as these two organizations, the Society might obtain members from them. Dr. HERBERT WRIGHT, Chairman of the Committee on Annual Meeting, stated that this suggestion had been considered by his committee and it was deemed not practicable for the Society to meet with these two organizations. The SECRETARY called attention to the minutes of the meeting of the Executive Committee of May 13, 1933, at which that committee had

also considered this matter. During the discussion of the relations of the Society with the American Bar Association, the SECRETARY called attention to the misleading and erroneous statements in regard to the Society made by Mr. John H. Wigmore at the 56th Annual Meeting of the American Bar Association at Grand Rapids, Michigan, in 1933, and published in the *American Bar Association Journal* for October, 1933, pages 594–595. Upon request, the SECRETARY read his letter correcting Mr. Wigmore's statements, published in the *American Bar Association Journal* for January, 1934, pages 59–60, and Mr. Wigmore's letter of apology to him of January 19, published in the *American Bar Association Journal* for March, 1934, pages 186–187. The SECRETARY also read to the Executive Council a letter of October 10, 1933, from Mr. Clarence E. Martin, former president of the American Bar Association, suggesting that the American Society of International Law be incorporated in the Section of International and Comparative Law of the American Bar Association.

At this point, President SCOTT asked to be excused for other business and left the meeting, and Mr. BUTLER took the chair.

After further deliberation, the following resolution was duly adopted:

> *Resolved,* That the Chairman appoint a subcommittee of the Council to inquire into and to report upon the possibility of coöperative relations of the American Society of International Law with the American Law Institute and the Section of International and Comparative Law of the American Bar Association.

For the Committee on Annual Meeting, Dr. HERBERT WRIGHT, its Chairman, submitted a copy of the program of the meeting. He stated that the committee had endeavored to keep to a minimum the number of formal papers so as to leave time for extemporaneous discussion. He also stated that he had received cordial coöperation from the members of the committee and from other members of the Society. The report was received and approved.

Professor JESSE S. REEVES, Chairman of the Committee on the Codification of International Law, stated that he would submit his report to the Society at its meeting on Saturday morning.

Professor PHILIP C. JESSUP, Chairman of the Committee on State Department Publications, was then invited to make a statement to the Council in regard to the work of that committee. Professor JESSUP responded and stated that he expected later to submit a written report for inclusion in the *Proceedings* of the Society. He said that the appropriation of the State Department for publications is now below what it was when this committee was appointed in 1928. He thought that the Society should have a standing committee on this subject, composed of a small number of members either residing in Washington or within easy reach, who could give continuous attention by keeping in touch with the officials of the State Department, of the Bureau of the Budget, and with the appropriate committees of Congress.

Professor JESSUP also called attention to the efforts of his committee to obtain better documentation of the results of the International Conferences of

American States. He reported that a resolution looking to this end had been adopted by the Pan American Conference at Montevideo in December last, and he recommended that a small committee be appointed by the Society to confer with the Director General of the Pan American Union in regard to the carrying out of that resolution.

Upon consideration of Professor Jessup's suggestions, the Executive Council adopted the following resolutions:

> *Resolved,* That the Executive Council hereby approves the appointment of a standing committee of the Society on publications of the Department of State, and of a special *ad hoc* committee to confer with the Director General of the Pan American Union in regard to the better documentation of the International Conferences of American States.
>
> *Resolved further,* That the Chairman of the Council be authorized to appoint the members of the said committees.

The SECRETARY then submitted a request of the President of the Society that the matter of the membership of the Society in the American Council of Learned Societies be reconsidered. The SECRETARY stated that such membership would cost the Society $35.00 a year dues and would entitle it to two delegates and alternates in the membership of the Council. He also read from the last bulletin of the Council an account of the work in which it is engaged. There ensued a discussion of the advisability of the Society joining the American Council of Learned Societies, at the conclusion of which, upon a vote duly taken, the Executive Council adopted the following resolution:

> *Resolved,* That the Executive Council of the American Society of International Law hereby authorizes an application to be made to the American Council of Learned Societies for membership of this Society in that organization, and authorizes the appropriate officers of the Society to take the necessary steps and make the required payments to effect such membership in case the Society's application be favorably acted upon.

Several members then inquired as to the publication of another cumulative index to the *American Journal of International Law.* The SECRETARY replied that, pursuant to the resolution of the Executive Committee of May 13, 1933, a small sum had been obtained from the Carnegie Endowment for International Peace to start the work of preparing another cumulative index, but no financial provision had yet been obtained for its publication. It was the sense of the meeting that the index should be issued to include Volume 28, and should be cumulative from Volume 1.

There being no further business, the Executive Council adjourned at 4.45 o'clock p. m., to meet in the Willard Hotel upon the adjournment of the Society on Saturday, April 28.

GEO. A. FINCH
*Secretary*

Approved:
CHARLES HENRY BUTLER
*Chairman*

# TREASURER'S REPORT

## January 1 to December 31, 1933

### INVESTMENT ACCOUNT

| | | |
|---|---|---|
| ON HAND JANUARY 1, 1933: | | |
| Cash on deposit with Union Trust Co. | $384.90 | |
| $6,000 Cuba Northern Railways, 5½'s (cost price) | 5,914.58 | |
| $1,000 Argentine Government, 5½'s (cost price) | 972.90 | |
| $2,000 Australian, 4½'s (cost price) | 1,853.75 | |
| $ 500 Associated Gas and Electric 5's (cost price) | 457.01 | |
| $ 500 Illinois Power and Light Corp. 5's (cost price) | 480.28 | |
| Total | | $10,063.42 |

| TRANSACTIONS DURING THE YEAR 1933: | | RECEIPTS | DISBURSEMENTS |
|---|---|---|---|
| Jan. 1. | Cash on hand at Union Trust Co. | $384.90 | |
| Jan. 31. | Interest on Union Trust Co. deposit | 5.77 | |
| Mar. 21. | Interest on Union Trust Co. deposit put in Business Account | | $5.77 |
| July 31. | Interest on Union Trust Co. deposit | 5.79 | |
| Sept. 20. | Interest on Union Trust Co. deposit put in Business Account | | 5.79 |
| Totals | | $396.46 | $11.56 |
| | | 11.56 | |
| Balance on deposit in Union Trust Co., December 31, 1933 | | $384.90 | |

### BUSINESS ACCOUNT

RECEIPTS

| | | | |
|---|---|---|---|
| January 1, 1933. Cash on hand: | | | |
| American Security and Trust Company | | | $1,187.32 |
| Petty cash | | | 10.00 |
| | | | $1,197.32 |
| Membership dues: | | | |
| 1932 | $139.50 | | |
| 1933 | 4,433.40 | | |
| 1934 | 353.93 | | |
| Back dues | 5.00 | | |
| | | $4,931.83 | |
| Subscriptions: | | | |
| 1933 | $1,902.75 | | |
| 1934 | 2,207.15 | | |
| | | 4,109.90 | |
| Foreign postage | | 364.56 | |
| Proceedings sold: | | | |
| 1932 | $31.20 | | |
| 1933 | 785.50 | | |
| 1934 | 215.35 | | |
| | | 1,032.05 | |

| | | | |
|---|---|---|---|
| Back numbers sold: | | | |
| Journals | $538.30 | | |
| Proceedings | 24.00 | | |
| | | $562.30 | |
| Analytical Index sold | | 2.80 | |
| Interest on securities: | | | |
| Cuba Northern Railways 5½'s | $330.00 | | |
| Argentine Government 5½'s | 55.00 | | |
| Australian 4½'s | 90.00 | | |
| Associated Gas and Electric 5's | 25.00 | | |
| Illinois Power and Light Corp. 5's | 12.50 | | |
| | | 512.50 | |
| Interest on deposits: | | | |
| Union Trust Company | $11.56 | | |
| American Security and Trust Co. | 3.62 | | |
| | | 15.18 | |
| Banquet tickets | | 784.00 | |
| Binding Journals for members | | 40.00 | |
| Special Supplement sales | | 5.70 | |
| Extra off-prints paid for | | 11.80 | |
| Carnegie Endowment fund for free subscriptions | | 205.00 | |
| Carnegie Endowment fund for Special Supplements | | 695.65 | |
| | | $13,274.27 | $13,274.27 |
| Cash on hand Jan. 1, 1933 ($1,197.32) and total receipts ($13,274.27) Dec. 31, 1933 | | | $14,471.59 |

DISBURSEMENTS

| | | | |
|---|---|---|---|
| Salaries: | | | |
| Managing Editor | $2,400.00 | | |
| Clerks | 1,020.00 | | |
| Assistant to Treasurer | 480.00 | | |
| | | $3,900.00 | |
| Journal: | | | |
| Preparation | $343.67 | | |
| Printing | 5,475.70 | | |
| Mailing | 556.87 | | |
| Off-prints | 202.69 | | |
| Miscellaneous | 45.50 | | |
| | | 6,624.43 | |
| Annual Meeting: | | | |
| Printing and postage | $47.21 | | |
| Telegrams | 3.55 | | |
| Reporting | 192.50 | | |
| Banquet | 836.20 | | |
| | | 1,079.46 | |
| Proceedings: | | | |
| Preparation | $51.37 | | |
| Printing | 1,002.24 | | |
| Off-prints | 87.51 | | |
| Mailing | 104.48 | | |
| | | 1,245.60 | |

| | | | |
|---|---|---|---|
| Office expenses: | | | |
| Stationery and postage | $493.84 | | |
| Telegrams and cables | .60 | | |
| Freight and express | 2.00 | | |
| Office supplies | 9.20 | | |
| Binding | 64.00 | | |
| Refunds | 34.75 | | |
| Miscellaneous | 141.79 | | |
| | | $746.18 | |
| Back numbers: | | | |
| Copies purchased | $161.52 | | |
| Postage for distribution | 46.89 | 208.41 | |
| Total disbursements | | | $13,804.08 |

SUMMARY

| | | |
|---|---|---|
| Total receipts during the year 1933 | | $13,274.27 |
| Total disbursements during the year 1933 | | 13,804.08 |
| Debit balance for the year 1933 | | $529.81 |
| Beginning balance January 1, 1933 (including cash on hand) | | $1,197.32 |
| Balance | | $667.51 |
| Balance on deposit in American Security and Trust Co. Jan. 1, 1934 | $657.51 | |
| Petty cash | 10.00 | |
| Total | $667.51 | |

ASSETS

| | | |
|---|---|---|
| Investments: | | |
| $6,000 Cuba Northern Railways, 5½'s (cost price) | $5,914.58 | |
| $1,000 Argentine Government, 5½'s (cost price) | 972.90 | |
| $2,000 Australian, 4½'s (cost price) | 1,853.75 | |
| $ 500 Associated Gas and Electric 5's (cost price) | 457.01 | |
| $ 500 Illinois Power and Light Corp. 5's (cost price) | 480.28 | |
| | | $9,678.52 |
| Cash: | | |
| Union Trust Company (Investment Account) | $384.90 | |
| American Security and Trust Co. (Business Account) | 657.51 | |
| Petty cash | 10.00 | |
| | | 1,052.41 |
| Accounts receivable: | | |
| Unpaid dues | 550.00 | |
| December coupon on $500 Illinois Power and Light Corp. Bond | 12.50 | |
| | | 562.50 |
| | | $11,293.43 |

## LIABILITIES

| | | |
|---|---|---|
| Accounts payable: | | |
| Printing and mailing October Journal | $1,652.32 | |
| 1934 Membership dues paid in 1933 | 353.93 | |
| 1934 Subscription fees paid in 1933 | 2,207.15 | |
| 1934 Proceedings paid for in 1933 | 215.35 | |
| Balance of Treaty Series, League of Nations fund | 120.52 | |
| Balance of allotment, Carnegie Endowment for Int. Peace | 195.50 | |
| | | $4,744.77 |
| Excess of assets over liabilities | | $6,548.66 |

Respectfully submitted,

LESTER H. WOOLSEY
*Treasurer*

## MINUTES OF THE EXECUTIVE COMMITTEE

### Thursday, April 26, 1934

Pursuant to the call of the Chairman, made orally during the meeting of the Executive Council just adjourned, the Executive Committee of the American Society of International Law met on Thursday, April 26, 1934, at 4.50 o'clock p.m. in the office of the Society at No. 700 Jackson Place, N. W., Washington, D. C.

Mr. CHARLES HENRY BUTLER, Chairman, presided.

The SECRETARY called the roll and all members of the Committee were present as follows:

| | |
|---|---|
| CHANDLER P. ANDERSON | HAROLD S. QUIGLEY |
| CHARLES HENRY BUTLER, *ex officio* | ELBERT D. THOMAS |
| GEORGE A. FINCH, *ex officio* | GEORGE T. WEITZEL |
| MANLEY O. HUDSON | GEORGE GRAFTON WILSON |
| WILLIAM I. HULL | LESTER H. WOOLSEY, *ex officio* |
| FREDERIC D. MCKENNEY | HERBERT WRIGHT |

The CHAIRMAN stated that the purpose of the meeting was to consider the revision of the resolution adopted by the Executive Committee on May 13, 1933, in regard to access to the safe-deposit box of the Society, and the suggestion in regard to the incorporation of the Society, both of which matters had been referred to the Executive Committee by the Executive Council.

Mr. HUDSON proposed that Mr. Howard T. Kingsbury, a member of the Council who was experienced in the matter of incorporating associations, be asked to make a statement. Without objection, the CHAIRMAN invited Mr. Kingsbury to address the meeting. Mr. KINGSBURY stated that it was his experience that associations of the character of the American Society of International Law could conduct their business and carry on their affairs with more facility and less difficulty by remaining unincorporated than by incorporating under laws such as the membership corporation law of the State of New York. Mr. MCKENNEY and Mr. BUTLER stated that their experience was the same with incorporation under the laws of the District of Columbia. After some further remarks, it was the consensus of the meeting that the American Society of International Law should not become incorporated.

The Executive Committee then considered the revision of the resolution of May 13, 1933, and, upon motion duly made and seconded, Messrs. MCKENNEY, ANDERSON and WOOLSEY were appointed a committee to revise the said resolution and report it to the meeting of the Council on Saturday, April 28.

The Executive Committee having transacted the business for which the meeting was called, adjourned at 5.40 p. m. *sine die*.

GEO. A. FINCH
*Secretary*

Approved:
CHARLES HENRY BUTLER
*Chairman*

## MINUTES OF THE EXECUTIVE COUNCIL

### Saturday, April 28, 1934

Pursuant to adjournment taken at the last meeting, the Executive Council of the American Society of International Law met in the Willard Room of the Willard Hotel in Washington, D. C., on Saturday, April 28, 1934, at 11.45 o'clock a. m.

Dr. JAMES BROWN SCOTT, President of the Society, presided.

Upon roll call by the SECRETARY, the following members were present:

| | |
|---|---|
| HERBERT W. BRIGGS | DENYS P. MYERS |
| PHILIP MARSHALL BROWN | HAROLD S. QUIGLEY |
| CHARLES HENRY BUTLER | BESSIE C. RANDOLPH |
| GEORGE A. FINCH | JESSE S. REEVES |
| MANLEY O. HUDSON | JAMES BROWN SCOTT |
| WILLIAM I. HULL | IRVIN STEWART |
| PHILIP C. JESSUP | GEORGE T. WEITZEL |
| CHARLES E. MARTIN | GEORGE GRAFTON WILSON |
| FREDERIC D. MCKENNEY | QUINCY WRIGHT |

CYRIL WYNNE

The first order of business was the election of officers and committees for the ensuing year, and the following were duly nominated and elected, the SECRETARY, upon motion duly made and seconded, casting a single ballot of the members present for each of the nominees:

*Chairman of the Executive Council:* CHARLES HENRY BUTLER

*Secretary:* GEORGE A. FINCH

*Treasurer:* LESTER H. WOOLSEY

*Executive Committee:* CHARLES HENRY BUTLER, *Chairman ex officio,* CHANDLER P. ANDERSON, GEORGE A. FINCH, *ex officio,* GREEN H. HACKWORTH, MANLEY O. HUDSON, WILLIAM I. HULL, CLARENCE E. MARTIN, FREDERIC D. MCKENNEY, HAROLD S. QUIGLEY, GEORGE T. WEITZEL, GEORGE GRAFTON WILSON, LESTER H. WOOLSEY, *ex officio.*

*Committee on Selection of Honorary Members:* JAMES W. GARNER, *Chairman,* MANLEY O. HUDSON, FRED K. NIELSEN, JESSE S. REEVES.

*Committee on Increase of Membership:* HOLLIS R. BAILEY, *Chairman.*

*Committee on Codification of International Law:* JESSE S. REEVES, *Chairman,* EDWIN M. BORCHARD, PHILIP MARSHALL BROWN, CHARLES K. BURDICK, EDWIN D. DICKINSON, CHARLES G. FENWICK, JAMES W. GARNER, MANLEY O. HUDSON, PHILIP C. JESSUP, ARTHUR K. KUHN, PITMAN B. POTTER, JAMES BROWN SCOTT, GEORGE GRAFTON WILSON, QUINCY WRIGHT.

Upon motion duly made and seconded, the President of the Society was authorized to appoint the members of the Committee on Increase of Membership on the recommendation of the Chairman of that committee.

Concerning the Committee on Annual Meeting, the Executive Council adopted the following resolution:

> *Resolved,* That the President of the Society be, and is hereby, authorized to appoint the members of the Committee on Annual Meeting, including the chairman, from the membership of the Society without reference to membership in the Executive Council, as an exception for the current year only.

The EDITOR-IN-CHIEF of the *American Journal of International Law* submitted the four numbers of the *Journal* published during the year and a written report on the work of each editor. The report of the EDITOR-IN-CHIEF was accepted, approved and ordered to be filed, with an expression of appreciation by the Executive Council of the work of the Board of Editors. The members of the Board were then nominated for reëlection to the Board of Editors of the *American Journal of International Law,* and upon motion duly made and seconded, the SECRETARY was directed to cast a single ballot for the editors nominated. The SECRETARY cast the ballot as directed and the following were declared duly reëlected members of the Board of Editors of the *Journal:*

GEORGE GRAFTON WILSON, *Editor-in-Chief*
GEORGE A. FINCH, *Managing Editor*
CHANDLER P. ANDERSON
EDWIN M. BORCHARD
PHILIP MARSHALL BROWN
EDWIN D. DICKINSON
CHARLES G. FENWICK
JAMES W. GARNER
MANLEY O. HUDSON
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PHILIP C. JESSUP
ARTHUR K. KUHN
JESSE S. REEVES
ELLERY C. STOWELL
LESTER H. WOOLSEY
QUINCY WRIGHT

The Executive Council then considered the appointment of two delegates and two alternates to the American Council of Learned Societies in case the application of the Society for membership in that organization be granted. Upon motion duly made and seconded, the President of the Society was authorized to appoint two delegates and two alternates to that organization.

On behalf of the committee appointed by the Executive Committee to consider the revision of the resolution of May 13, 1933, concerning access to the safe-deposit box of the Society, Mr. MCKENNEY read the following resolutions, which, after consideration, were duly adopted:

> *Whereas,* by paragraph 3 of Article V of the Constitution of the American Society of International Law, as revised April 25, 1925, it is provided that—
>
> "3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council."

*And whereas,* the Treasurer has requested the Executive Council to designate by name the bank or trust company located in the City of Washington in which all funds now in the Treasurer's possession and such as hereafter may be received shall be deposited for banking and safe-keeping:

*Therefore, Be it resolved,* That the Treasurer of the American Society of International Law be and he is hereby authorized and directed to maintain with American Security and Trust Company, a corporation now doing business in the District of Columbia under provisions of an Act of Congress of the United States of America, approved October 1st, 1890, 26 Stat. 625, the deposit and checking account in which all cash receipts belonging to the Society, from whatever source derived, shall be deposited and kept in name of the Society, subject to checks drawn in name of American Society of International Law by its Treasurer for the then office term.

*And be it further resolved,* That the Treasurer of the American Society of International Law be and he is also authorized and directed to contract with said American Security and Trust Company for the use of a suitable safe-deposit box or safe in the vaults of said Company, said contract and user thereunder to continue and to be renewed from year to year, until the Executive Council, by resolution duly adopted, shall otherwise determine.

Said safe-deposit box or safe shall be contracted for in name of American Society of International Law and maintained in said name until the Executive Council, by resolution duly adopted, shall otherwise determine.

It shall be provided in and by such contract that access to contents of such box or safe may be had only by not less than any two of the incumbents for the time being of the office of President, of Treasurer and of Secretary of said American Society of International Law.

The name of the person now occupying each one of said offices is as follows: *President,* JAMES BROWN SCOTT; *Treasurer,* LESTER H. WOOLSEY; *Secretary,* GEORGE A. FINCH. And it shall be the duty of the Secretary of the Society immediately after the adjournment of the Annual Meeting of the Society for election of officers to certify to said American Security and Trust Company, under seal of the Society and counter-signature of the then Chairman of the Executive Council, the names of the incumbents of each of said offices for the ensuing year.

Such certificates shall be accompanied by all requisite signature or other cards of identification.

At the request of the TREASURER, who was unavoidably absent, Mr. MCKENNEY then read the following resolution, which, after consideration, was also adopted:

*Be it resolved,* That a list in quadruplicate of any and all money and articles of value, including notes, stocks, bonds and intangibles of every sort belonging to American Society of International Law, but not including current funds on deposit to credit of the Society's deposit or checking account, shall be prepared, and after full opportunity for comparison, each copy thereof shall be signed individually by the respective incumbents of the Offices of President, Treasurer and Secretary of the Society, who are requested to attend in person at the deposit of the valuables so

listed in a safe-deposit box or safe in vaults of American Security and Trust Company.

One copy of said list so signed shall be left with said valuables in said box or safe and one shall remain with each of the persons signing same and thereafter, upon access being had to said box, like memoranda, in quadruplicate, shall be prepared and signed by each of the representatives of the Society present at such opening, one copy so signed to be left with other contents of the box or safe and one to be delivered to the then Treasurer of the Society for his file,—the additional copies to remain with the persons signing the same.

Mr. BUTLER stated that the regulations in regard to the length of addresses and discussions at the annual meeting had not been enforced and he insisted that in future meetings the Chairman of the meeting should require the speakers to observe these rules. Several other members of the Council concurred in Mr. BUTLER's remarks and, after considerable discussion, the following resolution was adopted:

*Resolved*, That in future annual meetings of the Society, the resolutions of the Executive Council regulating the time allowed for papers, addresses and discussions be rigidly enforced and that the chairman of the meeting read such resolutions to the Society at the opening of each session.

There being no further business, the Executive Council, at 1.10 o'clock p. m., adjourned *sine die*.

GEO. A. FINCH
*Secretary*

Approved:
JAMES BROWN SCOTT
*President*

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## OF THE

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*Corrected to July 1, 1934.

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